140-52

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 246.

JAMES J. HILL, APPELLANT,

vs.

THE CHICAGO AND EVANSTON RAILROAD COMPANY, THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, THE NORTH CHICAGO CITY RAILWAY COMPANY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 17, 1887.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, on Thursday, the fourteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

WM. H. BRADLEY, *Clerk.*

JAMES J. HILL *vs.* THE CHICAGO AND EVANSTON RAILROAD COMPANY, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith.	In Chancery.

2 Be it remembered that on the seventeenth day of February, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Order.

JAMES J. HILL *vs.* CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*	In Chancery.

And now, at this day, come the parties, by their counsel, and the plaintiff presents a transcript from the circuit court of Cook county and asks that the same be filed and the cause doeketed, and no opposition being made thereto it is ordered that the transcript be filed and the cause docketed without prejudice.

On the same day, to wit, on the seventeenth day of February, 1883, there was filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, a transcript of record from the circuit court of Cook county, Illinois, in said entitled cause; which said transcript is in the words and figures following, to wit:

3 *Transcript of Record from State Court.*

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
Cook County, }

Pleas before the Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the eighteenth day) of December, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the hundred and seventh.

Present: Honorable Murray F. Tuley, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, State's attorney; Seth Hanchett, sheriff.
Attest: JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 17th day of November, A. D. 1882, James J. Hill, by Messrs. Stiles and Lewis, G. E. Cole, and Ela and Parker, his solicitors, filed in said court his certain bill of complaint and bond for costs and caused to be issued out of and under the seal of said court the people's writ of summons, directed to the sheriff of Cook county to execute; which
4 said bill, bond, and writ, together with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Bill of Complaint.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

To the honorable the judges of said court, in chancery sitting:

James J. Hill, of the city of Saint Paul, in the State of Minnesota, complainant, brings this his bill of complaint against the Chicago and Evanston Railroad Company, a corporation duly incorporated under and by virtue of the laws of the State of Illinois; the Chicago, Milwaukee and Saint Paul Railroad Company, a corporation incorporated under and by virtue of the laws of the State of Wisconsin; the North Chicago City Railway Company, a corporation incorporated under and by virtue of the laws of the State of Illinois; William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, and John J. Johnson, of the city of Chicago, in the State of Illinois; J. C. Easten, of the State of Minnesota, and S. S. Merrill, of the State of Wisconsin; and thereupon your orator complains and says—

That on and prior to the 28th day of May, one thousand eight

hundred and eighty, the Chicago and Evanston Railroad Company had a capital stock of one thousand shares, of which a controlling interest, to wit, eight hundred and seventy-five shares, *were* in the possession and under the control of the defendant, William C. Goudy, with authority to dispose of the same in any manner which he might deem expedient, but that the equitable interest in said shares was in the defendant, The North Chicago City Railway Com-
5 pany, for whom said Goudy held said shares in trust, but with full power of disposition as aforesaid; that the defendant, The Chicago City Railway Company, besides being the equitable owner of a majority of the stock of the defendant, The Chicago and Evanston Railroad Company, was interested in and desirous of securing the construction of the street railroad of The Chicago and Evanston Railroad Company, to wit, from its junction with the Chicago and Pacific railroad to the south line of Calvary cemetery, so called, in the town of Evanston, in said State of Illinois, as a connecting line and extension of the line of street railroad owned and operated by said North Chicago City Railway Company within the limits of the city of Chicago, and to that end had theretofore advanced monies to The Chicago and Evanston Railroad Company, defendant, for the purpose of aiding in said construction, to secure the repayment of which advances the defendant, The Chicago and Evanston Railroad Company, executed and delivered to the defendant, The North Chicago City Railway Company, its promissory note for the sum of thirty-six thousand eight hundred and forty-seven dollars and forty-eight cents, which note was placed in the hands and control of the defendant Goudy, who held the same upon the same conditions and terms as said stock and was clothed with full power of disposition and control thereof; that said note was of even date with the contracts hereinafter mentioned and was executed by the Chicago and Evanston Railroad Company and deposited with the defendant Goudy, with the assent and approval of the defendant, The North Chicago City Railway Company, for the purpose — enabling him to perform the conditions of said contracts as hereinafter set forth, and as a part of the same transactions.

That the complainant and one A. B. Stickney were desirous of constructing said railroad of the defendant, The Chicago and Evanston Railroad Company, and of obtaining the control of said corporation and the ownership of the majority of the stock in said
6 corporation, and to that end, on said 28th day of May, one thousand eight hundred and eighty, entered into negotiations with defendant Goudy and the Chicago and Evanston Railroad Company, with the knowledge, concurrence, and approval of the defendant, The North Chicago City Railway Company, which negotiations resulted in a series of agreements and contracts, all bearing even date and all parts of the same transactions, to wit: The complainant and said Stickney, under the style of A. B. Stickney and Company, made and entered into an agreement in writing with the defendant, The Chicago and Evanston Railroad Company, whereby they promised and agreed to and with said defendant to furnish all material except such iron as the said defendant then owned and

to construct and complete in a good and substantial manner, so that cars might be used thereon, a single-track railroad for said defendant on the right of way then owned by said defendant or which should thereafter be first obtained by it, according to a contract, bearing even date therewith, entered into between said defendant and the defendant Goudy (which agreement is hereinafter set out), at its own cost and expense from its junction with the Chicago and Pacific railroad in said city of Chicago to the south end of Calvary cemetery, in the town of Evanston, with suitable side tracks and turnouts for the operation of said road, within four months after the first day of March, one thousand eight hundred and eighty-one; and it was expressly provided in and by such contract that if the said A. B. Stickney and Company should enter upon and prosecute in good faith the construction of the said road at a proper time and should be unable for any cause to complete the same within the said four months such delay should not work a forfeiture of said contracts, but should be compensated for in damages at the rate of twenty dollars per
7 day for each and every day's delay over said four months, but if said delay should continue for six months after the expiration of the four months aforesaid and said road should not then be completed the defendant, The Chicago and Evanston Railroad Company, might declare the contract at an end, and all work done and material furnished should be kept and retained by it as liquidated damages, but delay occasioned by restraining orders or the fault of said defendant or overpowering force should not be reckoned as a part of said six months; and the defendant, The Chicago and Evanston Railroad Company, in consideration of the premises, promised to pay the said A. B. Stickney and Company for doing said work and furnishing said material the actual cost thereof and ten per cent. additional on the completion of the work.

And it was further provided in and by said contract that the defendant, The Chicago and Evanston Railroad Company, would not during the continuance of said contract sell or encumber its property or any part thereof by lease, mortgage, trust deed, or otherwise without the consent of said A. B. Stickney and Company, nor, without their consent first obtained, contract any debts or make any contracts of any kind or for any purpose, and that the contract that day entered into between said defendant and defendant Goudy by authority of its board of directors in regard to procuring the right of way for said company was made with said Stickney and Company's express consent, and the defendant, The Chicago and Evanston Railroad Company, thereby agreed not to alter, change, or annul said contract or relieve said Goudy from any of the provisions thereof without the consent of said Stickney and Company during the continuance of said contract between said Stickney and Company and the defendant, The Chicago and Evanston Railroad Company, which contract is hereto attached and made a part of this complaint and marked Exhibit "B."

8 That on the same day and as a part of the same transaction the defendant Goudy entered into the contract and agreement with the defendant, The Chicago and Evanston Railroad

Company, with the knowledge, assent, and concurrence of the said A. B. Stickney and Company and the defendant, The North Chicago City Railway Company, hereinbefore referred to, and being the same agreement referred to in said agreement, Exhibit "B," in and by which it was recited that the defendant, The Chicago and Evanston Railroad Company, was desirous of obtaining the right of way for the construction of its line of railroad from the northern limits of the city of Chicago to Calvary cemetery, in the town of Evanston, and establishing its complete right of way in the city of Chicago, in and by which it was, among other things, agreed and contracted by and between said defendants, Goudy and The Chicago and Evanston Railroad Company, first, that he, said Goudy, would procure an adjustment of accounts growing out of a contract between the Chicago and Evanston Railroad Company and the Chicago and Pacific Railroad Company in regard to the construction of tracks on Hawthorne, Jones, and South Port avenues, in the city of Chicago, and the use of the tracks owned jointly by them, and would procure the right of way, said Chicago and Evanston Railroad Company to use and occupy that portion of the Chicago and Pacific railroad between Willow street and the point of junction of the Chicago and Evanston Railroad Company, and that if any sum should be found due from the defendant, The Chicago and Evanston Railroad Company, to said Chicago and Pacific Railroad Company therefor the said Goudy would pay the same or cause the defendant, The Chicago and Evanston Railroad Company, to be discharged from all liabilities therefor.

Second. That the right and authority, if any was required, to connect the track of the Chicago and Evanston Railroad
9 Company with the track of the Chicago and Pacific Railroad Company should be obtained by said Goudy for said defendant, The Chicago and Evanston Railroad Company, without expense to it.

Third. That he would procure or cause to be procured and vested in said company the right of way for the operation of its said railroad from the northern limits of the city of Chicago where the track of said company to be constructed in said city under a contract that day made with A. B. Stickney and Company (being contract Exhibit "B," hereto attached) should end to the Calvary cemetery upon such feasible and practicable line as the defendant, The Chicago and Evanston Railroad Company, might select; that where it should be necessary to use a street or part of a street he would procure or cause to be procured lawful permission therefor from the proper municipal officers. Where the line ran over private property the width of the right of way should be fifty feet for the distance of one mile and a half from the city limits and of the width of sixty feet for the remaining distance. All damages, costs, and considerations necessary to be paid in the procurement of said right of way should be paid by defendant Goudy. He, the said Goudy, also agreed, in and by said contract, to perform or at his own expense to procure the performance of all legal services necessary to be performed in the procurement of said right of way by condemnation

or otherwise; that said right of way over private property should be free from incumbrance and condition other than that the track should be laid within a specified time and the location of any four depots to be fixed by said Goudy, as therein provided. It was further agreed in and by said contract that if any suits should be commenced before the track should be relaid and put in repair on Hawthorne and South Port avenues north of the junction with the Chicago and Pacific railroad or within three months thereafter involving the title of said company to the right of way in said
10 avenues north of said Chicago and Pacific railroad in the city of Chicago, or the right to lay and maintain the tracks of said company in said city between the junction of the Chicago and Pacific railroad and the city limits or the right to operate the same with steam power, he, said Goudy, would take charge of said suits and render his professional services therein to said Chicago and Evanston railroad without any other consideration than that therein provided; and in consideration of said agreements by said Goudy the defendant, The Chicago and Evanston Railroad Company, in and by said agreement promised and agreed to pay said Goudy the sum of twenty-five thousand dollars upon the complete performance by him of said agreements on his part to be kept and performed.

It was further agreed in and by said contract that said agreements should be performed by said Goudy and said right of way secured by the first day of March, one thousand eight hundred and eighty-one (said right of way so agreed to be procured in and by said contract by said Goudy constitutes all the right of way on the line of the railroad which said A. B. Stickney and Company contracted to build in and by Exhibit "B"). It was further agreed that if judgments for damages for condemnation of the right of way on petition of said Chicago and Evanston Railroad Company should have been obtained before said first day of March, one thousand eight hundred and eighty-one, the pendency of any appeal from and such judgment at that time should not be a breach of the agreement, provided said Goudy should become security or should procure security on the appeal bond, as required by section thirteen of the statutes of eminent domain, so that possession could be taken of the property against which the judgment was rendered and good security be given to save the said Chicago and Evanston Railroad Company harmless from damages assessed or which might be assessed
11 for the land involved in said suit.

It was further agreed that if said Goudy failed to perform any of said agreements he should not be liable to damages beyond the loss to the right to the compensation and price or the just share thereof agreed to be paid by said Chicago and Evanston Railroad Compauy; which agreement is hereto attached and made a part of this complaint and marked Exhibit "A."

And your orator further showeth that on the same day and as a part of the same transaction and for the purpose of fully carrying into effect the intentions of the contracting parties, with the knowledge, consent, approval, and co-operation of the defendant, The North Chicago City Railway Company and The Chicago and Evanston

Railroad Company, and the directors and officers thereof, and the defendant, John De Koven, the said A. B. Stickney and Company entered into an agreement in writing with the defendant Goudy in and by which the defendant Goudy, among other things, in consideration of the covenants and agreements of said A. B. Stickney and Company therein, promised and agreed to and with said A. B. Stickney and Company—

First. That he would perform all and singular the covenants and agreements on his part contained in a certain contract having even date therewith between himself and the defendant, The Chicago and Evanston Railroad Company, being the exhibit hereto attached and marked "A," a copy of which was thereto attached and made a part of said contract.

It was in and by said contract further agreed, second, that said Goudy should at the time of the execution of said contract cause to be properly assigned to the defendant, John De Koven, as a trustee eight hundred and seventy-five shares of the capital stock of the Chicago and Evanston Railroad Company, to be held by him
12 in trust for the purpose thereinafter specified; that he would also at the same time cause to be properly assigned to said John De Koven as trustee a certain note bearing even date therewith, being the note, hereinbefore referred to, made by the Chicago and Evanston Railroad Company to the North Chicago City Railway Company, for the sum of thirty-six thousand eight hundred and forty-seven and forty-eight hundredths dollars, payable in one year from date, with eight per cent. interest, to be held by him in trust for the purposes thereinafter specified; and also that he would at the same time cause to be properly assigned to said John De Koven as trustee all his claim and rights to the sum of twenty-five thousand dollars, which became due to the said Goudy from the defendant, The Chicago and Evanston Railroad Company, on completion of said contract, Exhibit "A;" also to be held by him in trust for the purposes thereinafter specified.

Third. That he would and he thereby guaranteed to keep and save harmless the Chicago and Evanston Railroad Company and the said A. B. Stickney and Company of and from all debts of said company then existing and which might be contracted by said company before the control of said company should be transferred to said Stickney and Company as thereinafter provided, except said promissory note and the indebtedness growing out of the contract, Exhibit "A," and except any other indebtedness created by the agency and authority of said Stickney and Company and their assigns. It was further agreed by said Goudy in and by said contract that if any suits should be commenced before the track should be relaid and put in repair on Hawthorne or South Port avenues, north of the junction with the Chicago and Pacific railroad, or within three months thereafter, he would take charge of said suits in the same manner and to the same extent as he covenanted with the Chicago and Evanston Railroad Company to do in and by Exhibit "A."

13 In consideration of the premises the said Stickney and Company in and by said contract covenanted and agreed with said Goudy to pay him the sum of fifty-five thousand dollars in installments, namely, on the signing of said contracts the sum of twenty thousand dollars in ten days after said Goudy should have performed and completed all the agreements on his part contained in Exhibit "A," except the agreement as to professional services contained in the fourth article thereof, and given notice in writing thereof to said Stickney and Company. He should also at the same time of giving such notice furnish to such person in Chicago as said Stickney and Company should appoint proper evidence of such compensation. If said Stickney and Company should be not satisfied with such evidence, its sufficiency should be determined by disinterested persons to be chosen as thereinafter provided; the further sum of fifteen thousand dollars in sixty days; after the last payment shall have become due the further sum of twenty thousand dollars. It was further therein agreed that an appeal from any judgment in a condemnation proceeding should not be ground for the postponement of the payments aforesaid if bond should be given by the said Chicago and Evanston Railroad Company and said Goudy should become security or should procure security on the appeal bond, as required by section thirteen of the statutes of eminent domain, so that possession could be taken of said property and good security furnished by said Goudy, so as to save said Stickney and Company and said Chicago and Evanston Railroad Company harmless from all liability & damages assessed or which might be assessed for the land involved in said suits, but said Stickney and Company might pay the amount of any such judgment to the county treasurer according to the statute, and such payment should be considered a payment to said Goudy under said contract; and if the parties

14 should be unable to agree as to the time when any of such payment should be made according to the terms of said contract, that should be determined by two disinterested persons, one of whom should be chosen by each party, and in case of disagreement they should select a third disinterested person, and the decision of any two of them should be conclusive between the parties.

Said Stickney and Company further agreed with said Goudy in and by said agreement that they would perform all the agreements on their part agreed to be performed in a certain contract bearing even date therewith in relation to a railroad to be constructed for the Chicago and Evanston Railroad Company, a copy of which was thereto attached and made a part thereof, being the same agreement hereto attached and marked Exhibit "B."

And it was further agreed in and by said contract by the said Stickney and Company that when said road should be completed and the control of the Chicago and Evanston Railroad Company should be transferred as therein provided said Stickney and Company should cause it to be equipped with proper rolling stock and put in operation from its southern terminus to Calvary cemetery.

It was further mutually therein agreed that said eight hundred and seventy-five thousand shares of stock so transferred to said De

Koven as trustee, as aforesaid, and the said promissory note of the Chicago and Evanston Railroad Company and the said sum of twenty-five thousand dollars which should become due to said Goudy under said contract, Exhibit "A," which were by the terms of said contract to be transferred to said De Koven, trustee, should be held by him in trust until either the said Goudy or the said Stickney and Company should be entitled to the delivery of
15 the same according to the terms of said agreement; that said Stickney and Company should make the deferred payments, to wit: Fifteen thousand and twenty thousand dollars to the said John De Koven, in trust for said Goudy, to be paid to him or as he should direct; and it was further provided in and by said contract that if said Stickney and Company should fail or neglect to make either of said payments as therein provided the said Goudy might declare the contract ended, and that all money paid and all rights under said contract should be forfeited and might be kept by said Goudy as liquidated damages, and the said John De Koven should assign and transfer the shares of stock held by him to said Goudy, together with any money in his hands, and thereafter all rights and interests of said Stickney and Company in said stock or said note and all the money to become due to said Goudy under Exhibit "A" or in said company or its franchises or its property should cease and be at end.

It was further provided that if said Stickney and Company should make said payments at the time and in the manner specified and should fully perform all the covenants and agreements therein contained, then the said John De Koven, trustee, should assign and transfer to the said Stickney and Company said shares of stock and said promissory note, and the said moneys to become due to the said Goudy under said contract, Exhibit "A," and the full control of the board of directors and the officers of said company should be given to said Stickney and Company.

It is further provided that until the full performance by said Stickney and Company of all covenants contained therein on their part the said Goudy and such other persons as he might designate should have the right to vote the stock held by said John De Koven, trustee, and to have five of the seven directors while the board consists of seven, and if it is composed of five, then four of the
16 five directors, the same as if the said shares had not been assigned to said trustee. It was further therein declared to be the intention of the parties thereto to allow the said Goudy the full possession and control of the franchises and property of the Chicago and Evanston Railroad Company as security for the performance of the said agreement of said Stickney and Company.

It was further understood and agreed in and by said contract if default should be made by the said Goudy in the performance of any of his agreements therein contained, so that the deferred payments of fifteen thousand dollars and twenty thousand dollars should not become due and payable under said contract, and such default should continue for three months after the first day of March, 1881, then upon payment by said Stickney and Company of the sum of

twenty-five thousand dollars to said John De Koven, trustee, for the use of said Goudy, in lieu of said deferred payments of fifteen thousand dollars and twenty thousand dollars, it should be the duty of said De Koven to assign said stock and deliver said promissory note and the assignment of the claim of said Goudy against the Chicago and Evanston Railroad Company in his hands to said Stickney and Company, and said Stickney and Company should be entitled to recover from said Goudy such damages as they might sustain by reason of such default not exceeding thirty-five thousand dollars; but in case said Stickney and Company should neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said De Koven should transfer said stock and deliver said note and assignment in his hands to said Goudy or his assigns.

Which contract is hereto attached and made a part hereof and marked Exhibit "C."

And your orator further shows that said defendant, De Koven, duly accepted said trust, and that the defendant Goudy
17 caused to be assigned and transferred, as in said agreement provided, to said defendant, De Koven, said eight hundred and seventy-five shares of the stock of the said Chicago and Evanston Railroad Company and said promissory note and said Goudy's claim to the said sum of twenty-five thousand dollars against said Chicago and Evanston Railroad Company for obtaining said rights of way, as in said contract provided to be held by said De Koven in trust, as in said contract provided to be delivered to said Stickney and Company upon the performance by them of the terms of said contract.

That at the time of signing said contract said Stickney and Company paid to said Goudy the said sum of twenty thousand dollars pursuant to said contract and without any other consideration whatever moving them thereunto; that the said Goudy never did perform and complete the agreements by him to be performed except that for professional services specified in and by said contract, Exhibit "C," and never gave said Stickney and Company any notice thereof, as in said contract provided.

And your orator further shows that said Stickney and Company never failed or neglected to make any or either of the payments specified in said contract, Exhibit "C," but avers that the same never became due and payable prior to the filing of this your orator's bill of complaint.

And your orator further alleges that no default has occurred or been made by the said Goudy in the performance of the agreements by him to be performed in and by said Exhibit "C," so as to give said Stickney and Company the right to make the alternative payment of twenty-five thousand dollars, as provided in said contract.

But your orator avers that after sain contract was executed the said defendant, Goudy, from time to time applied to said Stickney and Company, with the knowledge and consent of said de-
18 fendant, The Chicago and Evanston Railroad Company, and said De Koven and said North Chicago City Railway Com-

pany, for further time in which to perform his said agreements and obtain said right of way, and represented that no interest would suffer by delaying the obtaining of said right of way until the spring of 1882; that said Goudy represented all the interest involved, to wit, the Chicago and Evanston Railroad Company, the North Chicago City Railway Company, and the said trustee; that said Stickney and Company thereupon assured said Goudy that unless the said right of way could be obtained within the time contemplated by said contract they would be unable to construct said road before the spring of 1882; whereupon it was agreed by and between said Goudy and said Stickney and Company that said Goudy might have more time than that mentioned in said contract, and that said Stickney and Company should proceed, in the spring of 1882, to construct said road as soon — said right of way should be secured.

That from time to time during the winter of 1881 and the spring and summer of 1882 the said Stickney and Company have applied to said Goudy to be informed as to how he was getting on in obtaining said right of way and when they could commence work, and were from time to time, in response to said inquiries, informed by said Goudy that he was progressing well and but a short delay would be necessary; that the time for the mutual performance of the covenants in said agreement contained was by mutual agreement waived and extended from time to time, with the constant assurance of said Goudy to said Stickney and Company that he was proceeding in good faith to obtain said right of way, and, as your orator charges, with the consent of the defendants, De Koven, Turner, and the directors of said company, and the said Stickney and Company acquiesced in said delay, under the expectation and belief induced by the conduct and assurance of said Goudy that but a short delay
19 would occur before said right of way would be obtained, and that said Goudy was honestly proceeding to obtain the same; that neither said Goudy nor any of said defendants ever gave the said Stickney and Company any notice or intimation that a default had occurred or would occur or that they so claimed so as to set the time running within which, by the terms of said contract, said Stickney and Company were to make the alternative payment of twenty-five thousand dollars therein specified until a very short time before the filing of this bill, when the defendant Goudy called on said Stickney and Company at Saint Paul and claimed (for the first time) that the time for the performance of said contract had expired, and that the defendant, John De Koven, trustee as aforesaid, had transferred and delivered said stock and said promissory note and said claim of said Goudy against the Chicago and Evanston Railroad Company to the defendant Turner; that said Stickney and Company thereupon offered to pay the said sum of twenty-five thousand dollars, and requested of said Goudy that said stock and said note and claim against the said Chicago and Evanston Railroad Company, together with the control of said company, might be transferred to them as in said contract provided, which said Goudy has declined and neglected to do or cause to be done.

And your orator further shows that (as your orator has lately

learned) at the time when said defendant Goudy called on said Stickney and Company at Saint Paul as aforesaid he, said Goudy, and said Turner (who was then one of the directors of said Chicago and Evanston Railroad Company and was then and is now largely interested in the defendant, The North Chicago City Railway Company, and is, as your orator believes, a heavy stockholder therein and president thereof) were in secret negotiation with the de-
20 fendants, Easton, Wadsworth, Walker, Hubbard, and Merrill, for the sale and transfer to the last-named defendants (who were acting for and in the interest of the defendant, The Chicago, Milwaukee and Saint Paul Railway Company) of the said eight hundred and seventy-five shares of the stock and the franchise and control and management of said defendant, The Chicago and Evanston Railroad Company, and said note and claim, and that at or about the same time the said Turner, Goudy, and De Koven transferred and delivered or caused to be transferred and delivered the said eight hundred and seventy-five shares of stock of said Chicago and Evanston Railroad Company so deposited with said De Koven as aforesaid and the control and management of said company and said note and claim to said defendants, Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill (representing said Chicago, Milwaukee and Saint Paul Railway Company); and your orator further shows that the board of directors of said Chicago and Evanston Railroad Company was then and at the time of the execution of said contract composed of said William C. Goudy, George Chandler, V. C. Turner, Samuel B. Chase, Ebenezer Buckingham, John W. Ela, and Thomas Parker, Jr., and that William C. Goudy was president and said Chandler (his partner in business) was secretary; that said Goudy, together with said Stickney & Co., owned substantially all of the stock of said company except said eight hundred and seventy-five shares; that the said defendants Goudy, Turner, Chandler, Chase, and Buckingham, as directors of said Chicago and Evanston Railroad Company and then composing a majority of the directors thereof, together with said defendants Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill, caused a pretended meeting of the stockholders of said last-named company to be held without any notice to complainant or to said A. B. Stickney and Company and without their knowledge, and at such pretended meeting of stockholders, in pursuance of a secret understanding and agreement and for a certain consideration, the amount and character of which is unknown to
21 your orator, and for the purpose of enabling said Wadsworth, Easton, Walker, Hubbard, Johnson, and Merrill to have full control of said Chicago and Evanston Railroad Company and a majority of its board of directors, said defendants Goudy, Turner, Chase, Buckingham, and Chandler resigned as directors of said company, and thereupon said defendants Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson were pretended to be elected directors of said company in place of said directors so resigning as aforesaid, and in such pretended election the said eight hundred and seventy-five shares of said stock were represented and voted

upon by said Easton, Walker, Wadsworth, Hubbard, Merrill, and Johnson, and was substantially all the stock represented at said pretended meeting.

And your orator further shows that thereupon said pretended directors Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson pretended to elect said defendant J. C. Easton president and said defendant T. W. Wadsworth secretary and treasurer of said Chicago and Evanston Railroad Company, said directors Ela and Parker having no notice or knowledge of such meeting or pretended election, and said pretended directors and officers are pretending and claiming to be the legal and actual directors and officers of said company, and have taken or are taking possession of the road bed and property of said company and are threatening and about to occupy, complete, use, and control the railroad of said company and hold, use, and control its franchises and property.

And your orator further represents that neither he nor said A. B. Stickney and Company had any notice or knowledge of said meetings or any of them, or of said action on the part of said defendants or either of them in the pretended transfer of said shares of said stock or said resignations of said old directors or said pretended election of said new directors, or of any action on the part of said
22 pretended new directors until a few days prior to the filing of this bill; that after said Goudy called upon said Stickney and Company as aforesaid your orator repeatedly endeavored to obtain information as to the action and intentions of said Goudy and said company and whether they were intending to carry out their said contracts, but was unable to do so; that your orator applied to John W. Ela and Thomas Parker, Jr., directors of said company, for information as to the same and as to said company and its affairs, and said Ela and Parker as such directors applied to the said pretended new officers of said company for such information and were refused it and were not permitted to examine the books or records of said company.

And your orator is therefore unable to set forth the transaction hereinbefore mentioned as fully and in detail as he would be glad to do; and your orator further shows that, although said defendants Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson pretend to act individually in said matter, they are officers or directors and stockholders of the said defendant, The Chicago, Milwaukee and Saint Paul Railway Company.

And your orator alleges and charges the fact to be that they are really acting in said matter for and in the interest of said last-named company, and so as to put the line of the Chicago and Evanston Railroad Company under the control of said Chicago, Milwaukee and Saint Paul Railway Company, which owns a competing line.

And your orator further shows that said defendants Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson had full notice and knowledge at the time of taking the transfer of said stock, note, and claim and the control of said Chicago and Evanston Railroad Company and at the time of all their actions hereinbefore mentioned of said three contracts between said Goudy, A. B. Stickney and Com-

pany and said Chicago and Evanston Railroad Company
23 and of what had been done under the same and by the said parties thereto, as hereinbefore set forth, and the rights of said A. B. Stickney & Co. and your orator thereunder, and that said A. B. Stickney & Co. were not in default, and that said Goudy and Turner had no right to said stock, and that neither they nor said Chicago and Evanston Railroad Company nor said De Koven had any right to transfer said stock or the control of said company to any one but said A. B. Stickney and Company or your orator.

And your orator charges the fact to be that the defendants Goudy, Turner, Chandler, Chase, Buckingham, and De Koven conspired and confederated together to defraud the said Stickney and Company and your orator and induce said Stickney and Company to enter into said contract, Exhibit "C," and pay said sum of twenty thousand dollars to said defendant Goudy, and all the defendants herein did, well knowing the premises and that said defendant Goudy had made no *bona fide* efforts to obtain said rights of way or performed said agreements by him to be performed, but had obtained a waiver of the time for the performance of said contract from said Stickney and Company by fraudulent assurances that he was prosecuting said efforts to obtain said right of way in good faith, *did* cause said stock and note and claim, together with the control of said Chicago and Evanston Railroad Company, to be assigned, transferred, and delivered, and the same was so transferred, assigned, and delivered by said defendant De Koven in violation of the trust upon which he held the same and in violation of and in fraud of the rights of said Stickney and Company to the defendant Turner, and by said Turner to said Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill without any consideration paid by said Turner for the same, but to the end and purpose that said Turner should hold said stock and note in trust for the defendant, The North Chicago
24 City Railway Company, until the transfer and assignment of the same for a consideration to said Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill; that, as your orator verily believes and so charges the fact to be, said Goudy never made any *bona fide* attempt to procure said right of way, and his said representations were false; and your orator further shows that the defendants, said pretended majority of the directors of the defendant, The Chicago and Evanston Railroad Company, said pretended new directors, refuse to recognize said Stickney and Company or your orator as holders and owners of said eight hundred and seventy-five shares of said stock or to permit them or your orator to vote the same.

Your orator further shows that said A. B. Stickney and Company were at and before the time of said pretended transfer of said eight hundred and seventy-five shares of said stock to said defendants Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill the owners of one hundred and ten & $\frac{3}{4}$rds other shares of the stock of said Chicago and Evanston Railroad Company, and continued to be the owners of the same up to the time of the transfer thereof to your orator, as hereinafter mentioned.

That the defendants claim and pretend that the directors of said

company shortly before the filing of this bill made a call for payment for said stock in full by a short date, fixed in said call, to meet indebtedness of said company and declare the same forfeited for non-compliance with such call, and that they, said new directors, are now the nominal and pretended owners of said stock, but in reality hold the same in trust for the defendant, The Chicago, Milwaukee and Saint Paul Railway Company; and your orator charges the fact to be that said pretended forfeiture or sale of said stock and such action on the part of said directors was caused by the defendants herein under the fraudulent pretense that the purpose
25 was to pay the indebtedness of the said company, when the real purpose was, under cover of a pretended forfeiture, to obtain the said shares of said stock, as well as said eight hundred and seventy-five shares, without giving any consideration therefor and to aid in the accomplishment of their said conspiracy to obtain control of said company without regard to the rights of your orator and to evade performance of the contracts hereinbefore set forth; and your orator further shows that there were at the time of said pretended forfeiture no debts of said company except those which by the terms of said contracts said defendant Goudy is bound to pay and save said company and your orator harmless from.

And your orators charges that such pretended forfeiture is fraudulent as to said A. B. Stickney and Company and your orator and should not affect their or his rights and should be set aside by the court.

And your orator further shows that prior to commencement of this action the said Stickney, for valuable consideration, assigned and transferred all his right, title, and interest in and under and by virtue of said contracts hereinbefore set forth and all stock and other property and rights, interests, and estate covered or accruing in or by said contracts or said matters and all rights of action growing out of the same, and also the said 110⅜ acres of stock to your orator, who is the sole owner and holder of the same, your orator having furnished all the money paid by said A. B. Stickney and Company in said matters and under said contracts and having been the only party interested or concerned with said Stickney therein.

And your orator is ready and willing and hereby offers to pay
26 into court, in such manner as this honorable court shall direct, the said sum of twenty-five thousand dollars, to be paid to and for the use of such of the defendants as are entitled thereto.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed and may, but not under oath, an answer under oath being expressly waived, and, according to the best and utmost of their knowledge, remembrance, information, and belief, full, true direct, and perfect answer make in the premises, and that said pretended transfer of said stock and note and claim to said Turner and to said Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson and said pretended election of said Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill as directors and of said Easton as

president and of said Wadsworth as secretary and treasurer of said Chicago and Evanston Railroad Company, and all forfeitures and all proceedings for forfeiture of said eight hundred and seventy-five shares or said one hundred and ten and ⅔rds shares of said stock be set aside and declared null and void by the court, and that the said defendants Turner, Wadsworth, Easton, Walker, Hubbard, Merrill, and Johnson be decreed to deliver and transfer and assign the said eight hundred and seventy-five shares of said stock and said note and said claim and the control of said Chicago and Evanston Railroad Company to your orator, and that said other defendants cause the same to be done so far as they have the control thereof, and that the defendant, The Chicago and Evanston Railroad Company, do register and cause to be transferred said stock on the books of said company to your orator in accordance with the charter and by-laws of said company, and that the title of your orator in and to said property be quieted, and that the defendants be perpetually enjoined and restrained from transferring, assigning, or disposing of said stock or promissory note or claim to any
27 person or persons other than this complainant, and from voting on or otherwise using said stock, and from permitting the said Turner or said Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill or any other person than your orator to vote said stock, and from recognizing the said Turner or Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill or any other person than your orator as the rightful owner and holder thereof, and from taking any possession, control, or management of or in any manner intermeddling or interfering with said Chicago and Evanston Railroad Company or its railroad, or its franchise, or any of its property, rights, interests, or privileges, and that in the meantime a temporary injunction issue during the pendency of this action so restraining and enjoining said defendants.

And may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, issuing out of and under the seal of this court, directed to the said defendants, commanding them and each of them, on a day certain therein to be named and under a certain penalty, to be and appear in this honorable court, then and there to answer, but not under oath (an answer under oath being hereby expressly waived), all and singular the premises, and to stand to, abide, and perform such further order, judgment, or decree as may be made against said defendants.

And your orator, as in duty bound, will ever pray, &c.

JAS. J. HILL.

STILES & LEWIS &
ELA & PARKER,
Solicitors for Complainant.

28 UNITED STATES OF AMERICA, }
State of Minnesota, District of Minnesota. }

At the city of St. Paul, in the county of Ramsey, in the State of Minnesota and district aforesaid, on this 30th day of October, one

thousand eight hundred and eighty-two, personally appeared James J. Hill, who, being duly sworn according to law, deposes and saith that he is the complainant in the foregoing bill, and has heard the same read and knows the contents thereof; that the said bill is true of his own knowledge except as to matters therein stated on his information and belief, and as to those matters he believes it to be true.

JAS. J. HILL.

Subscribed and sworn to before me this 30th day of October, one thousand eight hundred and eighty-two.

J. KLING,

[SEAL.] *Notary Public, Ramsey County, Minnesota.*

EXHIBIT C.

This article of agreement, made and entered into this twenty-eighth day of May, A. D. 1880, by and between William C. Goudy, of the city of Chicago and State of Illinois, party of the first part, and A. B. Stickney & Co., of St. Paul, in the State of Minnesota, party of the second part, witnesseth:

That for and in consideration of the covenants and agree-
29 ments of the said parties of the second part hereinafter contained the party of the first part agrees—

First. That he will perform all and singular the covenants and agreements on his part contained and in a certain contract, bearing even date herewith, by and between The Chicago and Evanston Railroad Company, party of the first part, and William C. Goudy, party of the second part, a copy of which is hereto attached, marked Exhibit A, and made a part of this contract.

Second. That he will, at the time of the execution of this contract, cause to be properly assigned to John De Koven, as a trustee, eight hundred and seventy-five shares of the capital stock of the Chicago and Evanston Railroad Company, to be held by him in trust for the purposes hereinafter specified; that he will also at the same time caused to be properly assigned to said John De Koven, as trustee, a certain note, bearing even date herewith, made by the Chicago and Evanston Railroad Company to the North Chicago City Railway Company, for the sum of thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars, payable in one year from date, with eight per cent. interest, to be held by him in trust for the purpose hereinafter specified, and also that he will at the same time cause to be properly assigned to said John De Koven, as trustee, all his claim and right to the sum of twenty-five thousand dollars which shall become due to him, the said William C. Goudy, from the Chicago and Evanston Railroad Company on completion of the contract before mentioned, which is hereto attached and marked Exhibit A, to be held by him in trust for the purposes hereinafter specified.

Third. That he will and does hereby guarantee to keep and save harmless the Chicago and Evanston Railroad Company and said

parties of the second part of and from all debts of said company now existing and which may be contracted by said company before the control of the corporation is transferred to the party of the second part, as hereinafter provided, except the note of thirty-six thousand and eight hundred and forty-seven $\frac{78}{100}$ dollars, hereinbefore mentioned, to the North Chicago City Railway Company and the indebtedness growing out of the contract hereto attached, marked Exhibit A, and except also any other indebtedness created by the agency and authority of the parties of the second part and their assigns.

He further agrees that if any suit shall be commenced before the track shall be relaid and put in repair on Hawthorne & South Port avenues north of the junction with the Chicago and Pacific railroad or within three months thereafter involving the title to the right of way of said company in said Hawthorne or South Port avenues north of said Chicago and Pacific railroad in the city of Chicago or the right to lay or maintain the track of said company in said city between the junction of the Chicago and Pacific railroad and the city limits or the right to operate the same with steam power, he will take charge of said suits and render his professional services therein to said party of the second part or the Chicago and Evanston Railroad Company without any other compensation than that provided in the agreement between the said William C. Goudy and the Chicago and Evanston Railroad Company. In consideration of the premises the said parties of the second part hereby agree to and with the party of the first part as follows:

First. To pay him the sum of fifty-five thousand dollars in installments, namely, on the signing of this contract, the sum of twenty thousand dollars; in ten days after the first party shall have performed and completed all the agreements on his part con-
31 tained in the contract, Exhibit A, except the agreement in relation to professional services contained in the fourth article thereof (and given notice in writing thereof to said party of the second part. He shall also, at the same time of giving said notice, furnish to such person in Chicago as said second party shall appoint proper evidence of such completion. If the second party is not satisfied with such evidence, its sufficiency shall be determined by disinterested persons, to be chosen as hereinafter provided), the further sum of fifteen thousand dollars; in sixty days after the last payment shall have become due the further sum of twenty thousand dollars.

It is expressly understood that an appeal from any judgment in a condemnation proceeding shall not be ground for postponement of the payment aforesaid if bond shall be given by the said company and the party of the first part shall become security or shall procure security on the appeal bond as required by section thirteen of the statute of eminent domain, so that possession can be taken of said property, and good security furnished by the party of the first part, so as to save the second parties and said Chicago and Evanston Railroad Company harmless from all liability for damages, assessed or which may be assessed, for the land involved in said suit, but the

parties of the second part may pay the amount of any such judgment to the county treasurer according to the statute, and such payment shall be considered as a payment to the party of the first part under this contract, and if the parties are unable to agree as to the time when any of such payments are to be made according to the terms of this contract that shall be determined by two disinterested persons, one of whom shall be chosen by each party, and in case of disagreement between the two persons they shall select a third disinterested person, and the decision of any two of them shall
32 be conclusive between the parties.

Second. That they will perform all the agreements on their part contained in a certain contract, bearing even date herewith, made by and between the Chicago & Evanston Railroad Company and the parties of the second part in relation to the construction of a railroad for the Chicago and Evanston Railroad Company, a copy of which is hereto attached, marked Exhibit B, and made a part of this contract.

Third. That when said road is completed and the control of the Chicago and Evanston Railroad Company shall be transferred as herein provided the second parties shall cause it to be equipped with proper rolling stock and put in operation from its southern terminus to Calvary cemetery.

It is mutually further agreed by and between the parties hereto that the said eight hundred and seventy shares of stock and the said note made by the Chicago and Evanston Railroad Company for thirty-six thousand eight hundred and forty-seven $\frac{75}{100}$ dollars and the said sum of twenty-five thousand dollars which shall become due to said party of the first part under the contract marked Exhibit A, hereto attached, which are by the terms of this contract to be transferred to John De Koven, trustee, shall be held by him in trust until either the party of the first part or of the second part shall be entitled to the possession of the same according to the terms of the agreement.

The said second party shall make the deferred payments aforesaid, to wit, fifteen thousand dollars and twenty thousand dollars, to the said John De Koven in trust for the party of the first part, to be paid to him or as he may direct.

If the second parties fail or neglect to make either of said payments, as hereinbefore provided, the said first party may de-
33 clare this contract ended, and all money paid and all rights under this contract shall be forfeited and may be kept by the first party as liquidated damages, and the said John De Koven shall assign and transfer the shares of stock held by him to the party of the first part, together with any money in his hands, and thereafter all rights and interests of the second parties in said stock or said note for twenty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars or the money to become due the said first party under this contract, marked Exhibit A, attached hereto, or in said company or its franchises or property, shall cease and be at an end.

If the second parties shall make said payments at the time and in the manner specified and shall fully perform all the covenants and

agreements herein contained, then the said John De Koven, trustee, shall assign and transfer to the second parties said shares of stock and the said note for twenty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars and the moneys to become due to said first party under the contract marked Exhibit A, hereto attached, held by him, and the full control of the board of directors and the officers of said company shall be given to the parties of the second part until the full performance by the second parties of all the covenants contained herein on their part. The first party and such other persons as he may designate shall have the right to vote the stock held by John De Koven, trustee, and to have five of the seven directors while the board consists of seven, and if it is composed of five, then four of the five directors, the same as if said shares had not been assigned to said trustee.

It is the intention of the parties hereto to allow the party of the first part the full possession and control of the franchises and property of the Chicago and Evanston Railroad Company as security for the performance of this agreement by the second party.

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It is further understood and agreed that the first party shall have the right to locate four depots on the line of the said road, but this shall not be construed to obligate said second parties or the Chicago and Evanston Railroad Company to erect any depot buildings at such points.

It is further understood and agreed that if default be made by the party of the first part in the performance of any of his agreements herein contained, so that the deferred payments of fifteen thousand dollars and twenty thousand dollars shall not become due and payable under this contract, and such default shall continue for three months after the first day of March, 1881, then upon the payment by said parties of the second part of the sum of twenty-five thousand dollars to said John De Koven, trustee, for the use of said party of the first part, in lieu of said deferred payments of fifteen thousand dollars and twenty thousand dollars, it should be the duty of said John De Koven to assign said stock and deliver said promissory note and the assignment of the claim of said party of the first part against the Chicago and Evanston Railroad Company in his hands to said party of the second part, and said party of the second part shall be entitled to recover from the first party such damages as they may sustain by reason of such default not exceeding thirty-five thousand dollars; but in case said second party shall neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said De Koven shall transfer said stock and deliver said note and assignment in his hands to the first party or his assigns.

In case of the death, resignation, refusal, or inability to act of the said John De Koven, trustee, named herein, then the president for the time being of the Merchants' National Bank of Chicago is hereby appointed successor in trust of said John De Koven, and as such successor he shall have the same powers and perform the same duties provided for said trustee herein; but if such

35

president of said bank shall decline to act as such trustee, then a successor in trust shall be selected by said parties; and if they fail to agree upon a successor, then such successor may be appointed by any court of competent jurisdiction.

This agreement shall be binding upon the heirs, executors, administrators, and assigns of the respective parties.

This agreement is executed by A. B. Stickney for himself and others who have authorized him to execute the same and furnished evidence of the authority to the cashier of the First National Bank of St. Paul for the benefit of the first party.

WILLIAM C. GOUDY.
A. B. STICKNEY & CO.

EXHIBIT A.

These articles of agreement, made and entered into this twenty-eighth day of May, 1880, by and between the Chicago and Evanston Railroad Company, a corporation existing under the laws of the State of Illinois, of the first part, and William C. Goudy, of Chicago, Illinois, of the second part, witnesseth:

That whereas the said party of the first part is desirous of obtaining the right of way for the construction of its line of railway from the northern limits of the city of Chicago to Calvary cemetery, in the town of Evanston, and establishing its complete right of way in the city of Chicago:

Now, therefore, the said party of the second part hereby
36 agrees, in consideration of the agreement of the said party of the first part on its part to be kept and performed—

First. That he will procure an adjustment of accounts between the party of the first part and the Chicago and Pacific Railroad Company growing out of a contract between said companies, dated on the second day of June, 1874, in regard to the construction of tracks on Hawthorne, Jones, and South Port avenues, in the city of Chicago, and the use of the track owned jointly by them, and will procure the right of way, the party of the first part to use and occupy that portion of the Chicago and Pacific railroad between Willow street and the point of junction of the Chicago and Evanston railroad, according to the provisions of the ordinance of the city council of the city of Chicago passed June 12, 1872, and if any sum in such adjustment and procuring said rights is due by the party of the first part to the Chicago and Pacific Railroad Company it shall be paid by said party of the second part or the party of the first part discharged from all liability therefor.

Second. That the right and authority, if any is yet required, to connect the track of the Chicago and Evanston Railroad Company with the track of the Chicago and Pacific railroad at the place on Hawthorne avenue fixed in the ordinance of the common council of Chicago passed June 12, 1872, shall be obtained by him for the party of the first part without expense to said party of the first part.

Third. That he will procure or cause to be procured for and vested

in the said party of the first part the right of way for the operation of the railroad of said party of the first part from the northern limits of the city of Chicago where the track of said company to be constructed in said city under a contract this day made with A. B. Stickney & Co. shall end to Calvary cemetery upon
37 such feasible and practical line as said party of the second part may select for building said road, using no greater curve than an eight-degree curve unless by consent in writing of said A. B. Stickney & Co. When it shall be necessary to use a street or part of a street he will procure or cause to be procured lawful permission therefor from the proper municipal officers. When the line runs over private property the width of such right of way shall be fifty feet for the distance of one mile and one-half north of the city limits and of the width of sixty feet for the remaining distance. All damages, costs, and considerations necessary to be paid in the procurement of said right of way or for the same shall be paid by said party of the second part.

He also agrees to perform or at his own expense procure the performance of all legal services necessary to be performed in the procurement of said right of way by condemnation or otherwise.

The said right of way over private property so to be procured shall be free from encumbrance and condition other than that the track shall be laid within a specified time, and the location of any of four depots to be fixed by the party of the second part as herein provided.

Fourth. He further agrees that if any suits shall be commenced before the track shall be relaid and put in repair on Hawthorne and South Port avenues, north of the junction with the Chicago and Pacific railroad, or within three months thereafter, involving the title to the right of way of said company in said Hawthorne or South Port avenues, north of said Chicago and Pacific railroad, in the city of Chicago, or the right to lay and maintain the track of said company in said city between the junction with the Chicago and Pacific railroad and the city limits, or the right to operate the same with steam power, he will take charge of said suits and
38 render his professional services therein to said party of the first part without any other compensation than that hereinafter provided.

In consideration of the foregoing agreement of said party of the second part said party of the first part hereby agrees to pay to the said party of the second part the sum of twenty-five thousand dollars upon the complete performance by him of the agreements upon his part to be kept and performed.

Said party of the first part further agrees to and with the said party of the second part that as a part of the consideration for the agreements herein contained on his part all donations of money, property, land, or obligations given or promised by parties owning or interested in lands between Chicago and Calvary cemetery as local aid shall belong absolutely to the said party of the second part free from any claims of the party of the first part; and in case any conveyances should be made to said party of land or property by

parties so owning or interested in such lands as local aid other than conveyances of the right of way, the same shall be held by said first party in trust for said party of the second part and shall be conveyed by it as he shall direct; and it is further agreed that the party of the second part may fix the location of four depots.

Said party of the first part further agrees that said party of the second part may, at his own cost and expense, procure new right of way within the city of Chicago and the right from the city of Chicago to operate said railroad by steam power and change the line of said road between a point on South Port avenue seven hundred feet south of the city limits and said city limits at the pleasure of said party of the second part, but if any such change is made the new right of way shall be secured from the city of Chicago
39 and the property-owners before the first day of October, 1880, but the right of way now existing under the ordinance of the city shall not be relinquished until the new ordinance shall be submitted to and approved in writing by A. B. Stickney & Co. and accepted by the party of the first part.

The said party of the second part shall perform the first, second, and third paragraphs of this agreement by the first day of March, 1881, but it is understood that if judgment for damages in proceeding for condemnation of the right of way on petition of the party of the first part shall have been obtained before that time the pendency of any appeal from any such judgment at that time shall not be a breach of the agreement, provided the party of the second part shall become security or shall procure security on the appeal bond, as required by section thirteen of the statute on eminent domain, so that possession can be taken of the property against which the judgment is rendered and good security be given to save the party of the first part from liability for damages assessed for the land involved in said suit.

It is further understood and agreed by the parties hereto that if the said party of the second part fails to perform any of the stipulations and covenants herein on his part to be performed he shall not be liable for damages beyond the loss of the right to the compensation and price or the just share thereof agreed to be paid by the party of the first part.

In witness whereof the said Chicago and Evanston Railroad Company, by Volentine C. Turner, a director and its secretary, who have been authorized by resolution of the board of directors and attested by its corporate seal, has executed this contract and the party of the second part has signed his name the day and year first above written.

40 [Chicago & Evanston R. R. Co. 1861. Seal.]

THE CHICAGO AND EVANSTON R'Y CO.,
By V. C. TURNER, *Director.*
GEORGE CHANDLER, *Secretary.*
WILLIAM C. GOUDY.

EXHIBIT B.

This article of agreement, made this 28th day of May, 1880, by and between A. B. Stickney & Co., of St. Paul, in the State of Minnesota, party of the first part, and the Chicago and Evanston Railroad Company, a corporation of the State of Illinois, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the payments and agreements hereinafter contained to be paid and performed by the second party, hereby agrees to and with the second party:

First. That they will furnish all material, except such iron and other material as the second party now owns, construct and complete in a good and substantial manner so that cars may be used thereon, using new ties eight — long, not less than six inches face and six inches thick, twenty-six hundred and forty to the mile, not less than forty-five-pound T rail, with proper fastenings, a single-track railroad for the second party on right of way now owned by the second party on Hawthorne and South Port avenues or which shall hereafter be first obtained by it (according to a contract, bearing even date herewith, entered into between the second party and one William C. Goudy), at its own proper cost and expense, from its junction with the Chicago and Pacific railroad to the south line of Calvary cemetery, in the town of Evanston, together with suitable side tracks and turnouts for the proper operation thereof,
41 within four months after the first day of March, 1881: Provided, that if they are delayed by restraining orders or writs of any kind or an overpowering force the time of such delay shall not be reckoned as a part of such four months: And provided further, that if the said first party shall enter upon and prosecute in good faith the construction of said road at a proper time and are unable from any cause to complete the same within the said four months such delay shall not work a forfeiture of this contract, but shall be compensated in damages at the rate of twenty dollars per day for each and every day's delay over said four months, but damages shall not be assessed or paid for any delay occasioned by the party of the second part or by restraining orders or writs or by an overpowering force.

But if such delay of the first party shall continue for six months after the expiration of the four months aforesaid, and said road shall not then be completed, the second party may declare the contract at an end, and all work done and material furnished shall be kept and retained by the party of the second part as liquidated damages, but delay occasioned by restraining orders or the fault of the second party or such overpowering force shall not be reckoned as a part of said six months.

Second. That they will keep an accurate account of the costs and

expenses of the work done and materials furnished under this contract, and at the completion thereof make an exhibit of the same to the second party, which amount, with an additional ten per cent., shall be fixed as the compensation which the party of the first part shall be entitled to receive from the second party as compensation for the work done and materials furnished under this contract.

42 And the second party, in consideration of the premises, hereby agrees to and with the first party to pay them for doing said work and furnishing said materials the actual cost thereof and ten per cent. additional on completion of their part of this contract.

The second party further agrees that in locating said line of road they will not use a sharper or greater curve than an eight-degree curve without the consent in writing of the first party.

That for the purpose of carrying out this contract the first party may take possession at any time of any of the right of way which has been or may be acquired, including all rights of second party on line of the Chicago and Pacific railroad, and also of all material now owned by said company, such as iron rails, &c., once put down in South Port and Jones avenues in the city of Chicago.

That second party will not, during the continuance of this contract, sell or incumber its property or any part thereof by lease, mortgage, trust deed, or otherwise without the consent of the first party, nor, without the consent first obtained in writing, contract any debts or make any contracts of any kind or for any purpose.

And it is hereby further agreed that the contract this day entered into by authority of the board of directors with William C. Goudy in regard to procuring the right of way for said company and other matters therein contained was made with the said first party's express consent, and the second party hereby agrees not to alter, change, or annul said contract during the continuance of this contract or release said Goudy from any of the provisions thereof without the consent, in writing, first obtained of the first parties.

If the party of the second part shall fail to perform any of the agreements provided herein to be performed by it or if the

43 party of the first part shall at any time during the progress of said work be prevented, by final decision of the supreme court of the State or of the United States, from laying or using any part of the track of said road, then, upon such failure or decision, the party of the first part may absolutely discontinue the performance of their said agreement herein, unless the party of the second part shall obtain new right to lay or use said track or part of track, and party of the second part shall pay them for the labor and materials already furnished and all damages suffered by them, and the party of the first part shall have a lien on all the property and franchises of said company therefor.

In witness whereof the parties of the first part have hereunto affixed their signature, by A. B. Stickney, and the party of the second part has caused this article of agreement to be executed by its

president and secretary and the corporate seal to be hereto affixed the day and year first above written.

A. B. STICKNEY & CO.,
By A. B. STICKNEY.

[Chicago & Evanston R. R. Co. 1861. Seal.]

THE CHICAGO & EVANSTON RAILROAD COMPANY,
By W. C. GOUDY, *Pres't.*

GEORGE CHANDLER, *Secretary.*

STATE OF ILLINOIS, }
Cook County. }

In the Circuit Court of Cook County.

JAMES J. HILL
vs.
44 THE CHICAGO AND EVANSTON RAILROAD CO. } In Chancery.
et al.

It is hereby stipulated that the foregoing exhibits (A, B, C) shall be attached to the bill in said cause and be considered a part thereof.

Dated December 17th, 1882.

JNO. N. JEWETT,
Sol't. for Def'ts.
E. WALKER, *C.*

Bond for Costs.

STATE OF ILLINOIS, }
County of Cook, } *ss:*

Circuit Court of Cook County.

CHARLES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

We do hereby enter ourselves security for costs in this cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action or to any of the officers of this court in pursuance of the laws of this State.

Dated this 17th day of November, A. D. 1882.

STILES AND LEWIS AND
ELA AND PARKER.

45 *Summons.*

STATE OF ILLINOIS, } ss:
County of Cook, }

The people of the State of Illinois to the sheriff of said county, Greeting:

We command you that you summon Chicago and Evanston Railroad Company, a corporation; The Chicago, Milwaukee and Saint Paul Railway Company, a corporation; The North Chicago City Railway Company, a corporation; William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, and John J. Johnson and J. E. Easton and S. S. Merrill, if they shall be found in your county, personally to be and appear before the circuit court of Cook county on the first day of the next term thereof, to be holden at the court-house, in Chicago, in said Cook county, on the third Monday of December next, to answer unto James J. Hill in his certain bill of complaint filed in said court, on the chancery side thereof; and have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness Jacob Gross, clerk of said court, and the seal
[SEAL.] thereof, at Chicago, in said county, this 17th day of November, A. D. 1882.

JACOB GROSS *Clerk.*

(Endorsed.)

Served this writ on the within-named J. C. Easton, Edwin Walker, and T. W. Wadsworth by delivering a copy thereof to each of them 17th day of November, A. D. 1882.

O. L. MANN, *Sheriff,*
By A. J. STONE, *Deputy.*

P'd, 15.00.

Served this writ by delivering a copy thereof to the within-
46 named William C. Goudy the 17th day of November, A. D. 1882.

ORRIN L. MANN, *Sheriff,*
By A. J. STONE, *Deputy.*

Served this writ on the within-named Chicago and Evanston Railroad Company (a corporation) by delivering to and leaving a copy of this writ with Tertius W. Wadsworth, secretary of said company, the president of said company not found in my county; also served this writ on the within-named The Chicago, Milwaukee and Saint Paul Railway Company (a corporation) by delivering to and leaving a copy of this writ with Tim. R. Chandler, agent of said company, the president of said company not found in my county; also served this writ on the within-named The North Chicago City Rail-

way Company (a corporation) by delivering to and leaving a copy of this writ with Volentine C. Turner, president of said company.

Also served this writ on the within-named Voluntine C. Turner, John De Koven, George Chandler, Elijah K. Hubbard, Samuel B. Chase, and Ebenezer Buckingham by delivering to and leaving a copy of this writ with each and every of them, all this 20th day of November, 1882, the within-named John J. Johnson and S. S. Merrill (non-residents) not found in my county.

ORRIN L. MANN, *Sheriff*,
By ELIAS SHIPMAN, *Deputy*.

And thereupon, on the 19th day of December, A. D. 1882, a certain order was made and entered of record, and a certain amendment to bill, notice, petition, and bond for removal of said suit into U. S. circuit court were filed in said cause; which said order, amendment, notice, petition, and bond are in the words and
47 figures following, to wit:

Order, Dec. 19, 1882.

JAMES J. HILL *vs.* CHICAGO AND EVANSTON RAILROAD COMPANY, The Chicago, Milwaukee and Saint Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, and S. S. Merrill.	42997, 1460.	Bill.

On motion of complainant and by agreement of the parties ordered that complainant have leave to amend bill *instanter*, as per amendment now filed herein, such amendment to have same effect as if sworn to.

And thereupon came the said defendants, The Chicago and Evanston Railroad Company, The Chicago, Milwaukee and St. Paul Railway Company, and The North Chicago City Railway Company, by their solicitors, and by leave of court filed their petition for the transferring of said cause into the United States circuit court for the northern district of Illinois and bond for removal.

48 *Amendment to Bill.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

By leave of the court this day given the bill of complaint in the above-entitled cause is hereby amended by the complainant as follows, to wit:

First. At the 9th line on page 28, after the words "and your orator," insert the words "further shows that he is informed and believes and."

Second. In 33rd line of 32nd page, after the words "and seventy-five shares," insert "and the said 110⅜ shares."

JAMES J. HILL,
By GURDON E. COLE,
STILES AND LEWIS, AND
ELA AND PARKER,
His Att'ys and Solicitors.

Consent is given to the filing of the following amendment to bill without oath, the same to have like effect as though sworn to.

JNO. N. JEWETT, *For Def't.*

49 *Notice.*

STATE OF ILLINOIS, }
County of Cook. }

Circuit Court, Cook County.

JAMES J. HILL
vs.
THE CHICAGO—EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

To James J. Hill, complainant, and his solicitors:

You are hereby notified that on Tuesday, the 19th day of December, A. D. 1882, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we shall, before his honor Judge Tuley, in the room usually occupied by him as a court-room, present a petition of The Chicago and Evanston Railroad Company, The Chicago, Milwaukee & St. Paul Railway Company, and The North Chicago City Railway Company, defendants herein, for an order for the removal of this cause to the United States circuit court for the northern district of Illinois

and ask for an order for such removal, at which time and place you can appear if you see fit.

Dated December 18, 1882.

EDWIN WALKER,
JNO. N. JEWETT,
Sol'rs for Petitioners.

Service accepted by copy Dec. 18, 1882.

STILES & LEWIS,
ELA & PARKER,
Complainant's Sol'rs.

50 *Petition for Removal.*

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY, THE CHICAGO Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, and S. S. Merrill.

The petition of the Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, and the North Chicago City Railway Company for a removal from the circuit court of Cook county, in the State of Illinois, to the circuit court of the United States for the northern district of Illinois.

Your petitioners, The Chicago and Evanston Railroad Company, a corporation created by and doing business under the laws of the State of Illinois; The Chicago, Milwaukee and St. Paul Railway Company, a corporation created by and doing business under the laws of the State of Wisconsin, and The North Chicago City Railway Company, a corporation created by and doing business under the laws of the State of Illinois, respectfully represent that at the time of the
51 commencement of this suit and now the Chicago and Evanston Railroad Company and the North Chicago City Railway Company were and by acts of the Legislature of the State of Illinois are doing business in said States, and that the Chicago, Milwaukee and St. Paul Railway Company was at the time of the commencement of this suit and now is a corporation created by and under an act of the State of Wisconsin and doing business in said State, and that their codefendants in this cause, William C. Goudy, Voluntine C. Turner (sued by the name of Volney C. Turner), John De Koven, George Chandler, Tertius W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, and Ebenezer Buck-

ingham, were at the time of the commencement of this suit and now are citizens of the State of Illinois, and their codefendants, John J. Johnson and S. S. Merrill, were at the commencement of this suit and still are citizens of the State of Wisconsin, and that their codefendant, Jason C. Easton, was at the commencement of this suit and still is a citizen of the State of Minnesota, and that the complainant, James J. Hill, was at the commencement of this suit and still is a citizen of the State of Minnesota.

And your petitioners further represent that the matter in dispute in this case, exclusive of costs, exceeds the sum or value of five hundred dollars, and that there is a controversy in this suit which is wholly between citizens of different States and which can be fully determined as between them, and that each one of your petitioners defendants in this suit is actually interested in such controversy.

And your petitioners further represent that the summons in this case is returnable on the third Monday of December, 1882, at a term of the circuit court of Cook county, in the State of Illinois, commencing on that day, and that this cause could not be tried at any time before the present term of this court.

52 Wherefore your petitioners pray that an order be entered in pursuance to and in accordance with the act of Congress in such cases made and provided for a removal *in* this cause to the circuit court of the United States for the northern district of Illinois.

And your petitioners offer to file and now present a bond, with good and sufficient surety, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court if such court shall hold that this suit was wrongfully or improperly removed thereto.

THE CHICAGO & EVANSTON RAILROAD COMPANY AND
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By E. WALKER, *Solicitor.*
THE NORTH CHICAGO CITY RAILWAY COMPANY,
By JNO. N. JEWETT, *Its Solicitor.*

Bond for Removal.

Know all men by these presents that the Chicago and Evanston Railroad Company, a corporation created by and existing under the laws of the State of Illinois; the Chicago, Milwaukee and St. Paul Railway Company, a corporation created by and existing under the laws of the State of Wisconsin, and the North Chicago City Railway Company, a corporation created by and existing under the laws of the State of Illinois, as principals, and Edwin Walker and William C. Goudy, of the city of Chicago, in the county of Cook and

53 State of Illinois, as surety, are held and firmly bound unto James J. Hill, of the city of St. Paul, Ramsey county, State of Minnesota, in the penal sum of five hundred ($500) dollars, law-

ful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and our successors, jointly and severally and firmly, by these presents.

Witness our hands and seals this eighteenth day of December, A. D. 1882.

The condition of this obligation is such that if the above-bounden Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, and the North Chicago City Railway Company shall enter and file or cause to be entered and filed in the next circuit court of the United States in and for the northern district of Illinois, on the first day of its next session, a copy of the record in a certain suit or action now pending in the circuit court of Cook county, State of Illinois, in which James J. Hill is complainant and The Chicago and Evanston Railroad Company, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, and S. S. Merrill are defendants, and shall pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully removed there, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done upon the removal of such suit from said State court into the United States court, then this obligation to be void; otherwise of force.

CHICAGO AND EVANSTON RAILROAD COMPANY,
By E. WALKER, *Solicitor.*
T. W. WADSWORTH, *Secretary.* [SEAL.]

54 CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
[SEAL.] By E. WALKER, *Solicitor.*
NORTH CHICAGO CITY RAILWAY CO.,
By V. C. TURNER, *President.*
HIRAM CRAWFORD, *Secretary.* [SEAL.]

EDWIN WALKER. [SEAL.]
WILLIAM C. GOUDY. [SEAL.]

UNITED STATES OF AMERICA, }
State of Illinois, Cook County, } *ss:*

I, Jacob Gross, clerk of the circuit court of Cook county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in a certain cause pending in said court, on the chancery side thereof, between James J. Hill, complainant, and The Chicago and Evanston Railroad Company *et al.*, defendants.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at Chicago, in said county, this sixteenth day of February, A. D. 1883.

JACOB GROSS, *Clerk.*

STATE OF ILLINOIS, } ss:
County of Cook, }

I, John G. Rogers, presiding judge of the circuit court in the State of Illinois, hereby certify that Jacob Gross, who signed
55 the above certificate, was at the time of signing the same and is now clerk of the said circuit court of Cook county, duly commissioned and qualified; that said court is a court of record, having a clerk and seal; that said attestation is in due for and by the proper officer, according to the laws of the State of Illinois, and that the above signature of said clerk is genuine.

Witness my hand and seal, at Chicago, in said county of Cook, this sixteenth day of February, A. D. 1883.

JNO. G. ROGERS, [SEAL.]
Judge of the Circuit Court of Cook County.

Rec'd $20.00 in full for this record.

JACOB GROSS, *Clerk.*

(Endorsed:) Filed, by leave of court, Feb. 17, 1883. Wm. H. Bradley, clerk.

56 On the same day, to wit, on the seventeenth day of February, 1883, came James J. Hill, the complainant, by his solicitors, and filed in said clerk's office his petition for an injunction in said entitled cause; which said petition is in the words and figures following, to wit:

57 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

To Hon. Thomas Drummond, judge of said court:

James J. Hill, complainant in the above-entitled cause, respectfully represents unto your honor that on or about the 19th day of December, 1882, a portion of the defendants in said cause filed their petition and bond in the circuit court of Cook county, Illinois, where said cause was commenced, for the removal of said cause to the circuit court of the United States for the northern district of Illinois; that said petition and bond was filed at such time, to wit, the day after the first day of the December term of the said United States circuit court, that the defendants would not be required to enter said cause or a copy of the record thereof in said circuit court of the United States until the first Monday of March, 1883, and said defendants have not entered said cause nor filed any copy of the record thereof in said circuit court of the United States; but after the filing

of said petition and bond and within a few days last past, and
58 while said suit was in said condition, said defendants or a portion of them have gone upon the line of said Chicago and Evanston Railroad Company and have done work and laid ties and rails on the said line and right of way, being same mentioned in bill herein and outside of Chicago city limits; and said complainant further represents that he hoped and believed that, the said bill having been filed, and said defendants having had notice of the same, and it being the season of the year when such work is unusual and cannot be properly and securely done, the said defendants would not go upon said line or right of way and attempt to build said road; but recently and within a few days last past said complainant was informed that said defendants were about to go to work or were working on said road, and he thereupon sent to have an examination made as to the same, and thereby ascertained that said defendants or a portion of them have recently and within a few days last past gone upon said line or right of way, and have laid ties and track on the same, and that said ties and track, or such portion thereof as has been more recently laid, have been laid in a very hasty, insecure, and improper manner, without any proper grading underneath said ties and track, and the surface of the same is rough and has great depressions below the level in different places, the ground being in such condition that the same could not apparently be properly laid, and such work having the appearance of having been done with a view to getting down, in some way,
59 as much in length of track as possible within a short time, and that there are at the end of said track a large quantity of rails, ties, and spikes, apparently for the purpose of continuing said work.

And the complainant says that he is informed and believes and fears that said defendants will continue to build said road and lay said track in said manner to the great damage of complainant and his rights and of the said Chicago and Evanston Railroad Company and its property and interests and franchise unless they shall be restrained by the injunction of this honorable court from continuing such work, and otherwise as prayed for in the prayer of said bill of complaint.

The said complainant therefore prays that an injunction may issue forthwith from this honorable court, as prayed for in said bill.

This application is made, however, without releasing or waiving complainant's right to move the court to have said cause remanded to said circuit court of Cook county; and said complainant makes this application and asks the court for leave so to do without prejudice to such right.

JAMES J. HILL,
By STILES & LEWIS AND
ELA & PARKER,
His Solicitors.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

FRANK R. GROVER, being duly sworn, on oath states that he is the person who made the examination mentioned in the
60 foregoing petition or application on behalf of said complainant, and that he is personally acquainted with the statements therein in regard to the work done and ties and rails laid and the condition thereof as therein set forth, and the same are true of his own knowledge.

And deponent further says that since the said examination, to wit, on yesterday, February 15th, 1883, he again went upon the line or right of way of the said Chicago and Evanston railroad to examine for said complainant as to what was then being done, and then found at work laying ties and rails on said line a large force of men, and, as deponent believes, from forty to fifty men; that employed or used in and about said work was a locomotive bearing the initials of the Chicago, Milwaukee and Saint Paul Railway Company, and cars bearing the same initials, and the tools with which said work was being done also bore the same initials; that deponent was then and there informed by the engineer in charge of said locomotive (which bore the number 522) that said locomotive belonged to said Chicago, Milwaukee & St. Paul Railway Company, and that deponent was then and there informed by the foreman in charge of said work and the laying of said ties and rails, and also by some of the men employed in said work, that in the doing of said work they (said foreman and men) were in the employ of and being paid by said Chicago, Milwaukee and St. Paul Railway Company, said foreman stating that all of said men were in the employ of said company, and said foreman also told deponent
61 that the said locomotive and cars being used in said work were owned by the said last-named company; and said foreman also stated that he had been in charge of laying all of said track that had been laid outside of the Chicago city limits.

FRANK R. GROVER.

Sworn to before me this 16th day of February, A. D. 1883.

H. S. STODDARD,
[SEAL.] *U. S. Com'r.*

(Endorsed:) Filed Feb'y 17, 1883. Wm. H. Bradley, clerk.

62 Afterwards, to wit, on the nineteenth day of February, 1883, there was filed in said clerk's office a stipulation in said entitled cause; which said stipulation is in the words and figures following, to wit:

Stipulation.

In the United States Circuit Court, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO & EVANSTON RAILROAD COMPANY *et al.*
In Chancery.
December Term, 1882.

The complainant having entered a motion for an injunction herein, and it not being convenient for the parties to submit the same now, it is stipulated that nothing to the prejudice of the complainant shall be done by the defendants until such time as the motion can be submitted.

And this stipulation shall expire in thirty days or sooner if the motion is submitted to the court before that time.

But the completion and operation of the railroad by the Chicago & Evanston R. R. Co. south of the north line of Lake View shall not be construed as a violation of this stipulation.

E. WALKER,
Sol. for Def'ts Served.
J. N. JEWETT,
Sol. for N. C. C. R'y & Those Served.
63 W. C. GOUDY.
ELA & PARKER,
STILES & LEWIS,
Sol'rs for Compl't.

The time for expiration of this stipulation is extended fifteen days.

W. C. GOUDY,
For Self and Def'ts Served.
ELA & PARKER,
Sol'rs for Compl't.

Endorsed: Filed Feb. 19, 1883. W. H. Bradley, clerk.

64 Afterwards, to wit, on the fifth day of March, 1883, came the North Chicago City Railway Company, Wm. C. Goudy, Volney C. Turner, and others, by their solicitor, and filed in said clerk's office their demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY. } In Chancery.

The joint and several demurrer of the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, Samuel B. Chase, and Ebenezer Buckingham, defendants, to the bill of complaint of James J. Hill, the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not, in and by his said bill, made or stated such a case as doth or ought
65 to entitle him to any such discovery or relief as is thereby sought and prayed for from or against these defendants or any of them. Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to the said bill, and they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN N. JEWETT,
Solicitor for Defendants.

STATE OF ILLINOIS, } *ss:*
Cook County, }

GEORGE CHANDLER, being duly sworn, on oath says that he is one of the defendants to the within-entitled suit, and that this demurrer is not interposed for delay.

GEORGE CHANDLER.

Subscribed & sworn to before me this 1st day of March, A. D. 1883.
[SEAL.] EDWIN STEWART,
Notary Public.

I hereby certify that in my opinion the within demurrer is well founded in point of law.

JOHN N. JEWETT,
Of Counsel.

Endorsed: Filed Mar. 5, 1883. Wm. H. Bradley, clerk.

66 Afterwards to wit, on the tenth day of March, 1883, came the Chicago and Evanston Railroad Company and others, by

their solicitor, and filed in said clerk's office their demurrer to the bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The joint and several demurrer of the Chicago & Evanston Railroad Company, the Chicago, Milwaukee, & St. Paul Railway Company, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, and Jason C. Easton, defendants, to the bill of complaint of James J. Hill, the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not in and by his said bill made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and
67 prayed for from or against these defendants or any of them.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

E. WALKER,
Solicitor for Defendants.

STATE OF ILLINOIS, } ss:
Cook County, }

JASON C. EASTON, being duly sworn, on oath says that he is one of the defendants to the within-entitled suit, and that this demurrer is not interposed for delay.

JASON C. EASTON.

Subscribed & sworn to before me this 9 day of March, A. D. 1883.

[SEAL.] FRANK E. GRANGER,
Notary Public.

I hereby certify that in my opinion the within demurrer is well founded in point of law.

E. WALKER,
Sol. for Def'ts.

Endorsed: Filed Mar. 10, 1883. W. H. Bradley, clerk.

68 Afterwards, to wit, on the thirty-first day of March, 1883, came the complainant, by his solicitors, and filed in said clerk's office his motion to remand in said entitled cause; which said motion to remand is in the words and figures following, to wit:

Motion to Remand.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The complainant in the above-entitled cause hereby moves the court to remand said cause to the circuit court of Cook county, Illinois, from whence it came, on the ground that the said United States circuit court has no jurisdiction in the action; and said complainant denies the allegation in the petition for the removal of the said cause that there is a controversy in this suit which is wholly between citizens of different States & which can be fully determined as between them.

GERDEN E. COLE,
STILES & LEWIS, AND
ELA & PARKER,
Sol'rs for Compl't.

Endorsed: Filed Mar. 31, 1883. W. H. Bradley, clerk.

69 Afterwards, to wit, on the fourteenth day of June, in the adjourned May term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon Thomas Drummond, circuit judge, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The motion to remand this cause to the State court and the demurrer to the bill of complaint herein having been heretofore heard and taken under advisement by the court, and the court having considered and being now fully advised in the premises overrules said motion to remand and said demurrer.

70 Afterwards, to wit, on the tenth day of July, in the July term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

This cause coming on upon the motion of the complainant filed herein for an injunction according to the prayer of the bill and the complainant having stated in open court that he only asked an injunction against the Chicago, Milwaukee and St. Paul Railway Company, the Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin Walker, John J. Johnston, and Elijah K. Hubbard, and the court having heard the motion and agreements of counsel and signified that an injunction would be allowed against all of said parties as should not enter into a stipulation satisfactory to the court for the protection of the complainant, — the said Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin
71 Walker, and Elijah K. Hubbard having produced and filed the following stipulation, to wit:

"The complainant having moved for an injunction against the Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin Walker, and Elijah K. Hubbard, according to the prayer of the bill—

It is now stipulated and agreed by the said defendants that they jointly and severally will obey and perform or cause to be obeyed and performed all decrees or orders which may be rendered against them or any of them, and will pay and satisfy all sums which may be awarded the complainant by reason of failure in such performance or by reason of any acts which would have been restrained if injunction had been issued and served, it being expressly understood that the right is reserved to the court to make such decree upon the final determination of this case, and upon such terms as it may adjudge to be necessary to protect all the equities of the complainant as they may be adjudged and settled by the final decree of this case.

[SEAL.] CHICAGO & EVANSTON RAILROAD CO.,
By J. C. EASTON, *President.*
J. C. EASTON.
EDWIN WALKER.
TERTIUS W. WADSWORTH.
ELIJAH K. HUBBARD.

Attest: T. W. WADSWORTH, *Sec'y.*

72 I am not a stockholder or director in the company named in this stipulation and have no interest in or connected with

it. My name was used by the parties interested in expectation that I would become a stockholder therein, but I have not done so, and for that reason decline to sign the foregoing stipulation, but will at all times cheerfully obey any order of the court and will take no action contrary to the terms and spirit of said stipulation.

S. S. MERRILL."

It is by the court now ordered that the motion for an injunction against the said The Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, Edwin Walker, and Elijah K. Hubbard be denied.

And it is further ordered that a writ of injunction according to the prayer of the bill against the Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston be allowed and issued by the clerk; and it is further ordered that it shall be, and is hereby, understood that the right is reserved to the court to make such decree upon the final determination of this case, and upon such terms as it may adjudge to be necessary to protect all the equities of the complainant as they may be adjudged and settled by the final decree in this case.

73 Afterwards, to wit, on the seventeenth day of July, 1883, there issued out of said clerk's office a writ of injunction in said entitled cause; which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Injunction Writ.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston, impleaded with the Chicago and Evanston Railroad Co. *et al.*, and to your counselors, attorneys, solicitors, trustees, and agents and to each and every of them, Greeting:

Whereas it hath been represented to the judges of our circuit court of the United States for the northern district of Illinois, in chancery sitting, on the part of James J. Hill, complainant, in his certain bill of complaint exhibited in our said circuit court, on the chancery side thereof, before the judges of said court, against you, the said Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston, impleaded with the Chicago and Evanston R. R. Co. *et al.*, to be relieved touching the matters complained of, in which said bill it is stated, among other things,

74 that you are combining and confederating with others to injure the complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience—

And it being ordered that a writ of injunction issue out of said court upon said bill enjoining and restraining you and each of you

70 Afterwards, to wit, on the tenth day of July, in the July term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

This cause coming on upon the motion of the complainant filed herein for an injunction according to the prayer of the bill and the complainant having stated in open court that he only asked an injunction against the Chicago, Milwaukee and St. Paul Railway Company, the Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin Walker, John J. Johnston, and Elijah K. Hubbard, and the court having heard the motion and agreements of counsel and signified that an injunction would be allowed against all of said parties as should not enter into a stipulation satisfactory to the court for the protection of the complainant, — the said Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin
71 Walker, and Elijah K. Hubbard having produced and filed the following stipulation, to wit:

"The complainant having moved for an injunction against the Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, S. S. Merrill, Edwin Walker, and Elijah K. Hubbard, according to the prayer of the bill—

It is now stipulated and agreed by the said defendants that they jointly and severally will obey and perform or cause to be obeyed and performed all decrees or orders which may be rendered against them or any of them, and will pay and satisfy all sums which may be awarded the complainant by reason of failure in such performance or by reason of any acts which would have been restrained if injunction had been issued and served, it being expressly understood that the right is reserved to the court to make such decree upon the final determination of this case, and upon such terms as it may adjudge to be necessary to protect all the equities of the complainant as they may be adjudged and settled by the final decree of this case.

[SEAL.] CHICAGO & EVANSTON RAILROAD CO.,
By J. C. EASTON, *President.*
J. C. EASTON.
EDWIN WALKER.
TERTIUS W. WADSWORTH.
ELIJAH K. HUBBARD.

Attest: T. W. WADSWORTH, *Sec'y.*

72 I am not a stockholder or director in the company named in this stipulation and have no interest in or connected with

it. My name was used by the parties interested in expectation that I would become a stockholder therein, but I have not done so, and for that reason decline to sign the foregoing stipulation, but will at all times cheerfully obey any order of the court and will take no action contrary to the terms and spirit of said stipulation.

S. S. MERRILL."

It is by the court now ordered that the motion for an injunction against the said The Chicago and Evanston Railroad Company, Jason C. Easton, Tertius W. Wadsworth, Edwin Walker, and Elijah K. Hubbard be denied.

And it is further ordered that a writ of injunction according to the prayer of the bill against the Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston be allowed and issued by the clerk; and it is further ordered that it shall be, and is hereby, understood that the right is reserved to the court to make such decree upon the final determination of this case, and upon such terms as it may adjudge to be necessary to protect all the equities of the complainant as they may be adjudged and settled by the final decree in this case.

73 Afterwards, to wit, on the seventeenth day of July, 1883, there issued out of said clerk's office a writ of injunction in said entitled cause; which said writ, together with the return of the marshal thereto attached, are in the words and figures following, to wit:

Injunction Writ.

Circuit Court of the United States of America, Northern District of Illinois, *ss:*

The United States of America to the Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston, impleaded with the Chicago and Evanston Railroad Co. *et al.*, and to your counselors, attorneys, solicitors, trustees, and agents and to each and every of them, Greeting:

Whereas it hath been represented to the judges of our circuit court of the United States for the northern district of Illinois, in chancery sitting, on the part of James J. Hill, complainant, in his certain bill of complaint exhibited in our said circuit court, on the chancery side thereof, before the judges of said court, against you, the said Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston, impleaded with the Chicago and Evanston R. R. Co. *et al.*, to be relieved touching the matters com-

74 plained of, in which said bill it is stated, among other things, that you are combining and confederating with others to injure the complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience—

And it being ordered that a writ of injunction issue out of said court upon said bill enjoining and restraining you and each of you

as prayed for in said bill, we therefore, in consideration thereof and of the particular matters in said bill set forth, do strictly command you, the said Chicago, Milwaukee and St. Paul Railway Company, Samuel S. Merrill, and John J. Johnston, your counselors, attorneys, solicitors, trustees, and agents, and each and every of you that you do absolutely desist and refrain from transferring, assigning, or disposing of the stock or promissory note or claim mentioned in the bill of complaint herein to any person or persons other than said complainant, James J. Hill, and from voting on or otherwise using said stock, and from permitting any other person or persons other than said complainant to vote said stock, and from recognizing any other person or persons other than said complainant as the rightful owner and holder thereof, and from taking any possession, control, or management of or in any manner intermeddling or interfering with said Chicago and Evanston Rail-
75 road Company or its railroad or its franchises or any of its property, rights, interests, or privileges until this honorable court, in chancery sitting, shall make other order to the contrary. Hereof fail not, under penalty of what the law directs.

To the marshal of the northern district of Illinois to execute and return in due form of law.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at
[SEAL.] Chicago, in said district, this 17th day of July, in the year of our Lord one thousand eight hundred eighty-three, and of our Independence the one hundred and eighth year.

W. H. BRADLEY, *Clerk.*

Special Deputy's Return.

UNITED STATES OF AMERICA, }
Northern District of Illinois, } *ss:*

Know all men by these presents that I have appointed, and by these present- do appoint, Geo. N. Jones my true and lawful deputy to execute the annexed writ, James J. Hill *vs.* The Chicago and Evanston R. R. Co. *et al.*, and to make return of the execution thereof according to law.

A. M. JONES, [SEAL.]
U. S. Marshal for the Northern District of Illinois.

I have served the annexed writ in the following manner, to wit:

Upon the Chicago, Milwaukee and St. Paul Railway Com-
76 pany, herein named, by reading the same to and within the presence and the hearing of and also by delivering a true copy of the same to T. W. Wadsworth, assistant commercial agent of said railway company, on the 26th day of July, A. D. 1883.

I did not serve the other defendants therein named, being unable to find them within my district.

A. M. JONES,
United States Marshal,
By GEO. N. JONES,
Special Deputy.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss :

GEO. N. JONES, being duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return, and that the expense returned by him in addition to the fees was actually incurred, and that the same is according to law.

GEO. N. JONES.

Subscribed and sworn to before me this 3rd day of August, A. D. 1883.

H. S. STODDARD.

Endorsed: Filed Aug. 3d, A. D. 1883. W. H. Bradley, clerk.

77 Afterwards, to wit, on the twenty-seventh day of August, in the July term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

And now, on this day, it appearing to the court that a clerical error was made in the drawing of the order for injunction entered herein on the tenth day of July, A. D. 1883, in the insertion of the name "Samuel S. Merrill" instead of "S. S. Merrill," and that the same error has occurred in drawing the injunction writ herein issued on the seventeenth day of July, A. D. 1883, it is therefore ordered by the court that said order and said writ be amended by inserting in the same the name "S. S. Merrill" wherever the name "Samuel S. Merrill" occurs therein.

78 Afterwards, to wit, on the first day of October, 1883, came The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnson, by their solicitor, and filed in said clerk's office their disclaimer in said entitled cause; which said disclaimer is in the words and figures following, to wit:

Disclaimer.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Disclaimer of The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnson; joint and several disclaimer of The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill and John Johnson, three of the above-named defendants, to the bill of complaint of James J. Hill, complainant.

The defendants, The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnson, severally say that they have not nor has either of them any right or interest in any of the matters in question in this suit, nor had they or either of them at any time any such right or interest, and they disclaim all right, title, and interest, legal and equitable, in any of the said matters, and they submit that the said bill ought to be dismissed as against
79 them and each of them, with costs.

CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY,
S. S. MERRILL,
JOHN JOHNSON,
By E. WALKER, *Sol'r.*

Endorsed: Filed Oct. 1, 1883. W. H. Bradley, cl'k.

On the same day, to wit, on the first day of October, 1883, came George Chandler, by his solicitor, and filed in said clerk's office his answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

80 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO & EVANSTON RAILWAY COMPANY *et al.* } Separate Answer of George Chandler, one of the Defendants.

The separate answer of George Chandler, one of the defendants, to the bill of complaint of James J. Hill, the complainant.

This defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained,

for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary to make answer unto, answering, says:

This defendant admits that on the 28th day of May, 1880, the Chicago and Evanston Railroad Company had a nominal capital stock, as fixed by its charter, of one thousand shares, of which
81 no part had been paid, and that certificates of the following form—that is to say:

Chicago and Evanston Company.

No. —. Shares, one hundred dollars. Shares, —.

CHICAGO, ——, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of — dollars on each share. Said shares are transferable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary.*

—had been issued to several persons, as evidence of their right to said stock on making full payment thereof, to make such payment; that each of said certificates recided on its face that no amount had been paid on the shares of stock mentioned in said certificate.

And this defendant admits that on the day last mentioned the North Chicago City Railway Company held the promissory note of the Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents; and this defendant says, upon information and belief, that of said certificates so issued those representing eight hundred and eighty-nine and one-third — belonged to and were controlled by the North Chicago City Railway Company, and that a certifi-
82 cate for one hundred and ten and two-thirds shares belonged to and was controlled by Edwin Haskins.

And this defendant admits that on the 28th day of May, 1880, William C. Goudy, Voluntine C. Turner, Ebenezer Buckingham, Samuel B. Chase, and this defendant were directors, and that on that day or subsequently thereto John W. Ela and Thomas Parker, Jr., were elected as two additional directors to fill vacancies then existing; and this defendant admits he held a certificate for one share of stock of the form aforesaid, on which nothing had been paid, and says that said share was owned by and under the control of the North Chicago City Railway Company, and that the only object of issuing the same to this defendant was to qualify him as a director.

And this defendant, further answering the bill of complaint, says that at a meeting of the directors held on the 4th day of September, 1882, Ebenezer Buckingham resigned and Edwin Walker was elected to fill the vacancy, and that at a meeting of said direct-

Disclaimer.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Disclaimer of The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnson; joint and several disclaimer of The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill and John Johnson, three of the above-named defendants, to the bill of complaint of James J. Hill, complainant.

The defendants, The Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnson, severally say that they have not nor has either of them any right or interest in any of the matters in question in this suit, nor had they or either of them at any time any such right or interest, and they disclaim all right, title, and interest, legal and equitable, in any of the said matters, and they submit that the said bill ought to be dismissed as against
79 them and each of them, with costs.

CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY,
S. S. MERRILL,
JOHN JOHNSON,
By E. WALKER, *Sol'r.*

Endorsed: Filed Oct. 1, 1883. W. H. Bradley, cl'k.

On the same day, to wit, on the first day of October, 1883, came George Chandler, by his solicitor, and filed in said clerk's office his answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

80 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO & EVANSTON RAILWAY COMPANY *et al.* } Separate Answer of George Chandler, one of the Defendants.

The separate answer of George Chandler, one of the defendants, to the bill of complaint of James J. Hill, the complainant.

This defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained,

for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary to make answer unto, answering, says:

This defendant admits that on the 28th day of May, 1880, the Chicago and Evanston Railroad Company had a nominal capital stock, as fixed by its charter, of one thousand shares, of which
81 no part had been paid, and that certificates of the following form—that is to say:

Chicago and Evanston Company.

No. —. Shares, one hundred dollars. Shares, —.

CHICAGO, ——, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of — dollars on each share. Said shares are transferable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary.*

—had been issued to several persons, as evidence of their right to said stock on making full payment thereof, to make such payment; that each of said certificates recided on its face that no amount had been paid on the shares of stock mentioned in said certificate.

And this defendant admits that on the day last mentioned the North Chicago City Railway Company held the promissory note of the Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents; and this defendant says, upon information and belief, that of said certificates so issued those representing eight hundred and eighty-nine and one-third — belonged to and were controlled by the North Chicago City Railway Company, and that a certifi-
82 cate for one hundred and ten and two-thirds shares belonged to and was controlled by Edwin Haskins.

And this defendant admits that on the 28th day of May, 1880, William C. Goudy, Voluntine C. Turner, Ebenezer Buckingham, Samuel B. Chase, and this defendant were directors, and that on that day or subsequently thereto John W. Ela and Thomas Parker, Jr., were elected as two additional directors to fill vacancies then existing; and this defendant admits he held a certificate for one share of stock of the form aforesaid, on which nothing had been paid, and says that said share was owned by and under the control of the North Chicago City Railway Company, and that the only object of issuing the same to this defendant was to qualify him as a director.

And this defendant, further answering the bill of complaint, says that at a meeting of the directors held on the 4th day of September, 1882, Ebenezer Buckingham resigned and Edwin Walker was elected to fill the vacancy, and that at a meeting of said direct-

ors held on the 5th day of September, 1882, Samuel B. Chase resigned and Jason C. Easton was elected to fill the vacancy created thereby, and at the same time Voluntine C. Turner resigned and S. S. Merrill was chosen to fill the vacancy thereby created, and at the same time this defendant resigned as director and secre-
83 tary and Tertius W. Wadsworth was elected director to fill the vacancy thereby created, and at the same time William C. Goudy resigned as director and president and Elijah K. Hubbard was elected director to fill said vacancy, and that on the same day Jason C. Easton was elected president and Tertius W. Wadsworth secretary and treasurer, and at the same time this defendant, at the request of the said William C. Goudy, assigned the share of stock held by him to some one of the persons at that time elected directors, but this defendant cannot remember the name of suchperson ; and this defendant says that since that time he has had no connection with the Chicago and Evanston Railroad Company or been interested in its stock, franchises, or property.

And this defendant, further answering the bill of complaint, denies that the defendants Turner, Chase, Buckingham, De Koven, and this defendant conspired and confederated together to defraud the said Stickney & Co. and the said James J. Hill or either of them and induce the said Stickney and Co. to enter into any contract whatever and to pay the sum of twenty thousand dollars or any other sum whatever to said Goudy, as alleged in the bill of complaint.

And this defendant denies all other allegations of the bill of complaint which are material or necessary to be answered unto by him not already hereinbefore specifically answered.

84 And now, having fully answered the said bill of complaint, this defendant prays to be hence dismissed with his costs in this behalf sustained.

GEORGE CHANDLER.

JNO. N. JEWETT,
Of Counsel for Def't.

(Endorsed:) Filed Oct. 1, 1883. Wm. H. Bradley, clerk.

On the same day, to wit, on the first day of October, 1883, came The North Chicago City Railway Company, by its solicitor, and filed in said clerk's office its answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

85 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } Bill for Relief.

The separate answer of The North Chicago City Railway Company, one of the said defendants, to the bill of complaint of James J. Hill, complainant.

This defendant, now and at all times hereafter saving and reserv-

ing to itself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill of complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary to make answer unto, answering, says—

That on and for some time prior to the 28th day of May, A. D. 1880, there was and had been a corporate organization under a special charter granted by the General Assembly of the State of Illinois known as the Chicago and Evanston Railroad Company, and the stock of said company consisted nominally of one thousand shares of one hundred dollars each, and that as representing said shares certain certificates had been issued by said company in the following form—that is to say:

86 Chicago & Evanston Railroad Company.

No. —. Shares, one hundred dollars. Shares, —.

CHICAGO, ——, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been the sum of — dollars on each share. Said shares are transferable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary*

That certificates in the form above set forth, but which showed on the face thereof that no payment had been made on account of the same, properly signed by the officers of said company, had been issued and were outstanding on the said 28th day of May, A. D. 1880, to the amount of about one thousand shares, and certificates representing eight hundred and eighty-nine and one-third of said shares were held and owned or absolutely controlled in its interest by this defendant. This defendant also, on the day aforesaid, held the promissory note of said Chicago & Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78) given for moneys advanced to said company by this defendant; that said certificates so
87 issued and all the other certificates for stock in said company then outstanding were subject to assessment for the full par value thereof and could not be assigned or transferred on the books of said company until all assessments thereon had been paid.

This defendant, further answering, says that the certificates above described were the only certificates representing stock in said Chicago & Evanston Railroad Company which had been issued and were outstanding on the said 28th day of May, A. D. 1880, and that this defendant, by virtue of its holding of the certificates representing said eight hundred and eighty-nine and one-third shares as

aforesaid, was in the practical possession and control of the organization known as the Chicago and Evanston Railroad Company, and that said certificates stood in the names of the defendants, Voluntine C. Turner (called in said bill Volney C. Turner), William C. Goudy, George Chandler, Samuel B. Chase, and Ebenezer Buckingham, who were directors of the said Chicago and Evanston Railroad Company and held the shares standing in their names solely for the account and benefit of the defendant (and without any direct personal interest therein).

This defendant, further answering, expressly denies that on the said 28th day of May, A. D. 1880, or at any other time, the said certificates for shares or a controlling interest therein or any part thereof and the said note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78) were in the possession or under the control of the said defendant, William C.
88 Goudy, with authority to dispose of the same in any manner which he might deem expedient; but this defendant admits and charges it to be true that some time prior to the said 28th day of May, 1880, said Goudy had verbally agreed with this defendant for the purchase of said certificates and of the indebtedness of said Chicago and Evanston Railroad Company to this defendant, then standing in open account upon the books of this defendant for the sum of twenty-five thousand dollars ($25,000); but the said Goudy being unable to pay the said sum of twenty-five thousand dollars ($25,000), time was given to him by this defendant for that purpose, terminable, however, at the pleasure of this defendant, so that on the 28th day of May, A. D. 1880, the said Goudy held simply an option, terminable at the will of this defendant, to purchase said certificates of shares and indebtedness for the sum of ($25,000), to be paid by him to this defendant, the said certificates and indebtedness remaining at all times in the control of this defendant, and under no circumstances to be transferred to said Goudy except upon the payment in full of the sum of money aforesaid; that on or about the said 28th day of May, A. D. 1880, the said Goudy represented to this defendant that he was negotiating with one A. B. Stickney for a sale of said certificates and indebtedness, but that he could not presently raise the money with which to pay the said sum of twenty-five thousand dollars ($25,000), and desired to know definitely what amount of time would be given to
89 him for that purpose; that at or about the same time the said Goudy either explained or submitted to this defendant a draft of his proposed contract with said Stickney, and it appearing therefrom that a time was thereby definitely fixed for the payment of money out of which the said Goudy would pay to this defendant the said sum of twenty-five thousand dollars ($25,000) if the said Stickney or the said Stickney and his associates performed said contract on his or their part this defendant consented to extend the time for the payment of said twenty-five thousand dollars ($25,000) to correspond with the times for the making of the deferred payments provided for in the contract proposed to be made by him with said Stickney, and thereupon and on the said 28th day of May,

A. D. 1880, entered into a contract in writing with the said Goudy respecting the sale of said certificates and indebtedness in the words and figures following—that is to say:

"This article of agreement, made and entered into this 28th day of May, 1880, by and between the North Chicago City Railway Company, party of the first part, and William C. Goudy, of the second part, witnesseth:

"That the party of the first part hereby sells and assigns to the party of the second part all the interest it has in the shares of the capital stock of the Chicago and Evanston Railroad Company, being about eight hundred and ninety shares, and also a promissory note or obligation of the Chicago and Evanston Railroad Company to the party of the first part for the sum of thirty-six thousand
90 eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78), without recourse.

"And that the party of the second part agrees to pay to the party of the first part the sum of twenty-five thousand dollars ($25,000) therefor as follows, to wit:

"The eight hundred and seventy-five shares of the stock shall be assigned to John De Koven, as trustee, and the said note or obligation shall be assigned and delivered to him as trustee to hold the same until the said sum of twenty-five thousand (25,000) dollars shall be paid to the said John De Koven as trustee under a contract of even date herewith between A. B. Stickney & Co. and the party of the second part or until there shall be default in the payment of the sum of fifteen thousand (15,000) dollars and twenty thousand (20,000) dollars or twenty-five thousand (25,000) dollars as therein provided.

"And it is further agreed by the parties hereto that there shall be paid from the payment of fifteen thousand (15,000) dollars mentioned in said contract between the said A. B. Stickney & Co. and the party of the second part the sum of twelve thousand five hundred (12,500) dollars, and from the payment of twenty thousand (20,000) dollars mentioned therein the further sum of twelve thousand five hundred (12,500) dollars, making the whole amount of twenty-five thousand (25,000) dollars.

"And in case said payments of fifteen and twenty thousand dollars shall not be made because of the default of the party of the second part, and the said A. B. Stickney and Co. shall pay the
91 sum of twenty-five thousand (25,000) dollars in lieu thereof, as provided in said contract, then the whole of said sum of twenty-five thousand dollars (25,000) dollars shall be paid to the party of the first part.

"When said payment of twenty-five thousand (25,000) dollars is fully made to the party of the first part all its interest in said stock and notes shall cease and be subject to the order and control of the party of the second part. If the said sum of twenty-five thousand (25,000) dollars shall not be made as aforesaid, then the said shares of stock and evidence of indebtedness shall be assigned and delivered by the said John De Koven, trustee, to the said party of the first part or to such person as it shall designate.

"The said contract between the said A. B. Stickney & Co. and the said party of the second part, which is deposited with said John De Koven, is referred to for greater certainty.

"This agreement shall be an order to the said John De Koven, trustee, to pay the sum of twenty-five thousand (25,000) dollars as aforesaid to the party of the first part, and in default to assign said eight hundred and seventy-five shares of stock and said note to the party of the first part.

"In witness whereof the said party of the first part has executed this contract by its president and secretary and affixed its seal, and the party of the second part has affixed his signature the day and year first above written.

"NORTH CHICAGO CITY R'Y CO.,
"By V. C. TURNER, *President.*
"WILLIAM C. GOUDY.

[L. S.] "HIRAM CRAWFORD, *Secretary.*"

92 This defendant, further answering, says that for convenience and in order to facilitate the transfer and deposit of certificates of shares and of the said indebtedness as contemplated in said contracts, this defendant caused certain of the certificates for shares in the said Chicago and Evanston Railroad Company to the amount of eight hundred and seventy-five shares to be surrendered and a new certificate for the same amount was issued by said railroad company in the name of the defendant, John De Koven, and the said railroad company also executed to this defendant its promissory note for the said sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78), being the amount of its indebtedness aforesaid to this defendant.

And this defendant, further answering, says that the rights of this defendant in the said note and certificates referred to in said agreement were well known to and understood by the said A. B. Stickney at the time of the execution of the several contracts set out in said bill of complaint and which are made a part thereof as exhibits thereto; and not only were this defendant's rights in respect to the said note and certificates known to said A. B. Stickney, as shown by said bill, but also the terms and conditions of the said agreement above set forth, between the said Goudy and this defendant, were fully known to A. B. Stickney, by whom the negotiations on behalf of A. B. Stickney & Co. with said Goudy leading up to the several contracts referred to in said bill were had.

93 This defendant, further answering, expressly denies that the said note and stock certificates were delivered to or held by said Goudy with full and absolute *and absolute* power of disposition and control, and insists and states it to be true that the right of said Goudy to dispose of the said note and certificates was limited to the terms and conditions set out in the said agreement executed by this defendant and said Goudy hereinbefore recited; that the express condition upon which this defendant was to make any transfer of the said shares and note was that this defendant should be paid the said sum of twenty-five thousand dollars therefor at the times and

in the manner stated in said agreement, and that in case of the failure of the said Goudy to make said payments all his right of control and disposition over said securities should cease and the same should be delivered to this defendant by the said John De Koven.

This defendant, further answering, admits that the original contracts of which Exhibits "C," "B," and "A" purport to be copies were executed by the parties thereto respectively at or about the time of their respective dates, and that the same were executed with the knowledge of the defendant; this defendant also admits that at the time of the execution of its contract with said Goudy aforesaid it expected and understood that it would receive from said Goudy payment of the sum of twenty-five thousand dollars out of the deferred payments of fifteen thousand dollars and twenty thou-
94 sand dollars, or the alternative payment of twenty-five thousand dollars provided for in the contract between said Goudy and said A. B. Stickney & Co., and at the time when the said payments would become due according to the express terms and provisions of said last-named contract; that in entering into said contract with said Goudy this defendant relied expressly upon the provisions in the contract between said Goudy and said Stickney and Company that "in case said Stickney and Company should neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said De Koven should transfer and deliver said note and other papers in his hands to said Goudy or his assigns" as the remotest contingency which could arise affecting or delaying the payments to this defendant of the said sum of twenty-five thousand dollars, and that in case said money was not so paid this defendant would, under the terms of its contract with said Goudy, be entitled to an immediate return of the said note and the certificates representing stock in said Chicago and Evanston Railroad Company aforesaid; and this defendant also admits that with this understanding it deposited the said note and certificates representing stock with the said John De Koven, as trustee, as set forth in the contract between the said Goudy and said A. B. Stickney and Company, a copy of which is attached to said bill of complaint as "Exhibit C," but in respect to all of the exhibits to said bill this defendant, being informed that mistakes have oc-
95 curred in the transcribing of the same, does not admit their accuracy as copies and reserves the right to correct all errors therein by a presentation and proof of the originals, as it may be advised is proper.

This defendant, further answering, admits that, in pursuance of the terms of the contract between the said Goudy and said A. B. Stickney and Company, with full knowledge of its provisions, it did consent to a deposit of the said note of the Chicago and Evanston Railroad Company for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78) and the certificate aforesaid, representing shares in the capital stock of the company, with the said John De Koven, as trustee, upon the conditions specified in said contract and no others; and this defendant avers it to be true that it never at any time or in any manner assented to or

had knowledge or information of any change or modification of the terms of said contract, and that if any such change or modification was made (which this defendant, upon information and belief, denies) such change or modification did not and could not affect the rights of this defendant under the contract aforesaid between this defendant and said Goudy.

This defendant, further answering, also admits that the said John De Koven accepted the position of depositary of the note, certificate, and other papers mentioned in the said contract between said Goudy and A. S. Stickney and Company upon the terms and conditions in said contract set forth, and thereupon the said documents and
96 papers were delivered to him, and he became in some sense a trustee thereof and liable to account for the same in accordance with the provisions of said contract and not otherwise.

This defendant, further answering, says that it does not know and was in no manner interested in knowing whether said Stickney and Company paid to said Goudy twenty thousand dollars or any other sum upon the execution of said contract or at any other time, or whether said Goudy performed on his part the contract made by him with said A. B. Stickney and Company, or whether said Goudy ever became entitled to the payments of fifteen thousand dollars ($15,000) and twenty thousand dollars ($20,000) provided for in said contract; but this defendant insists and states the fact to be that it was in nowise concerned in the performance of the said contract on the part of the said Goudy except as a means on his part of receiving the said sum of twenty-five thousand dollars ($25,000), which he stipulated to pay this defendant; and this defendant is now informed and, upon information and belief, avers it to be true that the said Goudy failed to procure the right of way for the construction of said Chicago and Evanston railroad, as he bound himself to do by the terms of his contract with said A. B. Stickney and Company, and that as a consequence of such failure he never became entitled to the deferred payments of said fifteen thousand dollars ($15,000) and twenty thousand dollars ($20,000) mentioned herein, and that for that reason he never gave to said A. B. Stickney and
97 Company any notice of his performance of said contract on his part.

And this defendant, further answering, expressly states and charges that by reason of the default of the said Goudy aforesaid the alternative provision of his contract with the said A. B. Stickney and Company took effect, and the said A. B. Stickney and Company, by the terms of their contract with said Goudy, upon the payment of twenty-five thousand dollars ($25,000) to said John De Koven at the time in said contract mentioned, would have been entitled to a transfer to them of the papers and securities deposited with said De Koven as trustee as aforesaid.

And this defendant, further answering, upon information and belief expressly states it to be true that the said Stickney and Company actually failed and neglected to pay to said Goudy or to the said defendant De Koven, as trustee, or to any other person for the use of the said Goudy or this defendant the said sum of twenty-five thou-

sand dollars ($25,000) or any part thereof, as by the terms of their contract they were bound to do after the defaults of the said Goudy aforesaid in order to entitle themselves to a transfer to them of the note and certificates of stock and other papers so deposited with the said John De Koven as aforesaid, and that by reason of such default and failure on their part all their right to a transfer of the said papers and securities absolutely ceased and determined, and the said John De Koven thereupon and by the terms of the contract
98 between said Stickney and Company and said Goudy and upon the request or order of the said Goudy became bound to assign and transfer the said papers and securities to the said Goudy or his assignee, and the said Goudy afterwards and on or about the first day of June, A. D. 1882, in consequence of the default and failure of the said Stickney and Company aforesaid demanded of the said De Koven an assignment and delivery of the said papers and securities to him in accordance with the provisions of said contract, and this defendant, being advised of the demand of the said Goudy so made as aforesaid upon the said De Koven, thereupon and on or about the eighth day of June, 1882 (the said papers and securities being then in the possession of the said De Koven), caused to be served upon and delivered to the said De Koven a notice and demand in writing in the words and figures following, to wit:

JUNE 8TH, 1882.

"John De Koven, Esq., trustee, &c.

DEAR SIR: You are hereby notified to re-assign and deliver to the North Chicago City Railway Company the eight hundred and ninety shares or thereabouts of the capital stock of the Chicago and Evanston Railroad Company, and also a promissory note or obligation of said Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven ($36,847.78) dollars and seventy-eight cents, without recourse, in accordance with the provisions of a certain contract, a copy of which is hereto attached.

Y's respectfully, V. C. TURNER,
President N. C. C. R'y Co."

99 And attached to said notice and demand, so served upon the said De Koven, was a copy of the contract between the defendant and the said Goudy hereinbefore set forth.

And this defendant, further answering, says that afterwards, in pursuance of the notice and demand so made upon him by this defendant as aforesaid, the said De Koven assigned and delivered to this defendant the note and certificate of stock in said notice and demand referred to, which are the same note and certificate hereinbefore mentioned and to which the said complainant in and by his bill of complaint prefers a claim as assignee of A. B. Stickney and Company.

And this defendant, further answering, says that it has no knowledge or information, except from the statements of said bill, of any application or applications made by said Goudy to said Stickney and Company for further time within which to perform his agree-

ment and obtain the right of way or of any representations made by him to said Stickney and Company in support of such applications, if any such were made, and this defendant expressly denies that it had any knowledge or notice of such applications or that it ever assented to any such extensions. This defendant also denies that the said Goudy represented any of the rights or interests of this defendant with reference to said shares and note, except so far as clearly defined in and by its contract with said Goudy hereinbefore set forth. This defendant also denies that said Goudy represented the said Chicago and Evanston Railroad Company in any of the matters relating to an extension of time in said bill referred to, and also further and expressly denies upon information and belief that said Goudy represented or had any right or authority to represent said John De Koven, as trustee or otherwise, in any of the matters set forth or referred to in said bill of complaint, and upon like information and belief this defendant denies that the said John De Koven had any knowledge, notice, or information of any extension of time for the performance of the contracts referred to in said bill, or any or either of them, made by or granted to said Goudy, or that he knew or was advised of any of the matters set forth in said bill, except as they appeared upon the face of the papers so deposited with him as aforesaid, prior to or at the time of his transfer of the said note and certificate to this defendant as hereinbefore stated.

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This defendant, further answering, denies any and all knowledge, notice, or information of the negotiations, inquiries, and explanations which took place between said Stickney and Company and said Goudy during the winter of 1881 and the spring and summer of 1882, if any such there were, or of any assurances given by said Goudy to said Stickney and Company or of any action thereon by said Stickney and Company affecting the terms of the several contracts aforesaid. This defendant admits that it never notified said Stickney and Company of the default made by them and insists that it was under no obligation to give such notice. This defendant also denies any and all knowledge, notice, or information of any interview between said Goudy and said Stickney and Company at St. Paul or elsewhere shortly before the filing of the said bill of complaint or at any other time after the execution of the said several contracts aforesaid, or of what occurred at such interview or interviews, if any such there were, but this defendant admits that the said note and the certificate for stock in the Chicago and Evanston Railroad Company had been assigned and transferred by said John De Koven to this defendant and delivered to the said defendant, Voluntine C. Turner, the president of this defendant, as stated in the said bill, long prior to the filing of the said bill of complaint and in pursuance of the written demand of this defendant served upon the said De Koven hereinbefore recited.

101

And this defendant, further answering, and admitting that the defendant, V. C. Turner, is a stockholder and president to this defendant, and was during all the time covered by the transactions in said bill referred to, expressly denies that said Turner or this defend-

ant, at the time of the alleged interview between the said Goudy and the said Stickney and Company at St. Paul or at any other time, was engaged in any such or other negotiations with the said defendants, Easton, Wadsworth, Walker, Hubbard, and Merrill, or any or either of them for the sale and transfer to them or any of them of the note and certificates of stock in the Chicago and Evanston Railroad Company previously held by said De Koven, as trustee, as aforesaid, or for the surrender of the control of the said com-
102 pany to said last-named defendants; but this defendant admits that after the transfer of said note and certificate of stock to this defendant by the said John De Koven as aforesaid, and the same had become the absolute property of this defendant, discharged from any liens or claims thereon of the said A. B. Stickney and Company as against this defendant, this defendant, by a new arrangement with said Goudy made on or about the first day of July, 1882, agreed to sell to him about eight hundred and ninety shares represented as aforesaid by the certificates upon which no payment had been made and the said note for the sum of twenty-five thousand dollars to be paid in cash on the assignment and delivery of the certificates and note and on or before the first day of October thereafter, and this defendant is informed and believes and therefore admits it to be true that said Goudy thereupon entered into negotiations with said defendant, Easton, and some others for the sale to them of the said certificates and note, which sale, if consummated, would give to such purchasers the control of the corporate organization of the said Chicago and Evanston Railroad Company; that shortly afterwards the said Goudy so far succeeded in said last-mentioned negotiations that at his request this defendant caused the said note and certificates of shares to be deposited with the Commercial National Bank of Chicago for delivery to said Goudy or to the said Edwin Walker, supposed to represent the said Easton and others, upon the payment to said bank for this defendant of the sum
103 of twenty-five thousand dollars; that said sum of twenty-five thousand dollars was afterwards and on or about the fifth day of September, A. D. 1882, paid to said bank and received by this defendant, and in consequence thereof and in pursuance of the terms of the said deposit the said note and stock were delivered by said bank and passed absolutely out of the ownership and control of this defendant, and this defendant has not now and has not since had any title to or interest in the same or any part thereof, and, as this defendant is informed and believes, the said note and certificates of shares passed into the possession and control of the said Easton and others who are unknown to this defendant, but whether the same were taken by them for the account and use of the defendant, The Chicago, Milwaukee and St. Paul Railroad Company, or whether in the making of the said negotiations with said Goudy they represented the said last-named company this defendant does not know and is not in any way informed, and therefore cannot answer upon belief or otherwise.

This defendant, further answering, admits that the board of directors of the said Chicago and Evanston Railroad Company, at the

time of the transactions referred to in said bill of complaint, was composed of the said defendants, William C. Goudy, George Chandler, Voluntine C. Turner, Samuel B. Chase, and Ebenezer Buckingham, and that after the making of said contracts John W. Ela and Thomas Parker, Jr., were chosen directors to fill two va-
104 cancies, and all of these persons remained directors until the change hereinafter stated, and that said William C. Goudy was president and said George Chandler was secretary of said company. This defendant denies that said Goudy held in his own name and for his own account any certificates of stock in the Chicago and Evanston Railroad Company, and this defendant denies that any of said certificates were held by the said A. B. Stickney and Company when said contracts were made and entered into; but this defendant admits, upon information and belief, that after the delivery of said note and certificates by the said Commercial National Bank and the payment to said bank, for the use and account of this defendant, of the sum of twenty-five thousand dollars a meeting of the directors in said Chicago and Evanston Railroad Company was held, at which, as this defendant is informed and believes and therefore admits to be true, the said Goudy, Turner, Chandler, Chase, and Buckingham resigned their offices as such directors, and the said defendants, Easton, Wadsworth, Walker, Hubbard, and Merrill, were elected in their places; but this defendant alleges, upon information and belief, that said John J. Johnson was never a director of said company, and that said Merrill afterwards declined and refused to serve as such, and that a vacancy exists in said board of directors in consequence of such refusal on the part of said Merrill.

This defendant, further answering, says that it has no knowledge or information as to what has since then occurred in the management of said Chicago and Evanston Railroad Company or as
105 to who have become or are now interested therein, except that it is informed and believes and therefore admits it to be true that the said company has been, under its new organization aforesaid, actively engaged in the construction of its railroad and in the prosecution of such work has expended a large amount of money; in all of which, however, this defendant has no interest as a stockholder in said company or otherwise.

This defendant, further answering, says that it does not know and is not informed whether said Ela and Parker or the said A. B. Stickney and Company were notified of any stockholders' meeting or of any meeting of the board of directors of said Chicago and Evanston Railroad Company subsequent to said directors' meeting, or of the action had or taken by said board of directors at such meetings, and this defendant is therefore unable to answer the allegation of said bill in that behalf upon belief or otherwise, and leaves the complainant to make proof thereof as he may be advised is proper. This defendant, however, admits, upon information and belief, that said Easton, Wadsworth, Walker, and Hubbard claimed to have been legally and properly elected as directors of said company and have been and still are acting as such, and that said Easton has been elected and is acting as president and said Wadsworth as secretary

of said company. As to whether the said parties so elected and acting as directors as aforesaid are acting for or in the interest of said Chicago, Milwaukee and St. Paul Railroad Company, this
106 defendant does not know, but it is informed that such is not the fact.

This defendant, further answering, says that it does not know and is not informed and cannot answer upon belief or otherwise what notice, if any, the said Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson or any or either of them had at the time of the election of directors as aforesaid or at any other time of the several contracts referred to in said bill as Exhibits A, B, and C, or of the action taken under the same, or of the claims of the said A. B. Stickney and Company founded thereon, but this defendant insists and charges it to be true that at the time of the transfer and delivery of said notes and certificates of shares by the said De Koven to this defendant the said A. B. Stickney and Company were in default in respect to the payment of money under their contract with said Goudy, and the said De Koven by the terms of said contract and of the contract aforesaid, between this defendant and said Goudy, was bound to transfer and deliver said note and certificate to this defendant; that this defendant was then the absolute owner of said note and certificates and, having received the possession thereof, had full right and authority to sell and dispose of the same to such person or persons and upon such terms as to it should seem proper, and that neither the said A. B. Stickney and Company nor the said complainant had therein or have since had, unless they have subsequently become purchasers, any right in or to said note or certificates or the possession or control of the same or any part thereof as against this defendant.

107 And this defendant, further answering upon information and belief, expressly denies that the defendants Goudy, Turner, Chandler, Chase, Buckingham, and De Koven or any of them conspired or confederated together to defraud the said Stickney and Company or the said complainant, or to induce the said Stickney and Company to make or enter into any or either of the contracts referred to in said bill or to pay said sum of twenty thousand dollars or any other sum, and as to the said defendant, John De Koven, this defendant says that he never did have any personal interest in nor was he at any time a party to any of the negotiations, trades, contracts, or understandings relating to any of the matters referred to in said bill, and that he simply acted by request of the parties as the custodian of the papers referred to in the contract between A. B. Stickney and Company and said Goudy, controlled and limited in his custody thereof by the provisions of said contract and the contract of said Goudy with this defendant, with all of which the said De Koven fully and literally complied in transferring and delivering said note and certificates to this defendant.

This defendant, further answering, says that it is without knowledge or information and is therefore wholly unable to state what effort said Goudy made to procure the right of way for the construction of said Chicago and Evanston railroad or what assurance, if

any, were given by him to said Stickney and Company in re-
108 spect thereto or that may have occurred between said Stick-
ney and Company and said Goudy by way of postponing the time for the performance of their contracts; but this defendant states and charges it to be true that said last-named contract was a personal one between said Goudy and said Stickney and Company, made, of course, with the knowledge and consent of this defendant, and to the exact terms of which as made this defendant agreed; but this defendant expressly denies that it ever assented to or had notice of any modification or changes therein or waived the performance of any of its conditions, and this defendant is informed and believes and therefore charges that the same is true in respect to the said defendants Turner, Chase, Chandler, Buckingham, and De Koven; and this defendant expressly denies that the said Goudy had any right or authority to make any change or modification of the said contract affecting this defendant or its rights in the premises; that the said Stickney and Company and the said complainant, as a member of said firm, were at the time of entering into the several contracts in said bill referred to fully advised of the rights and interests of this defendant in the said note and certificates and of its control over the corporate organization of the Chicago and Evanston Railroad Company, and were therefore bound to take notice of the limitations of the authority of said Goudy to dispose of the same and of the terms and conditions of his contract with this defendant, from which alone such authority was derived.

109 This defendant, further answering, expressly denies that said De Koven did any act or thing in violation of the trust reposed in him, or that he failed in any part of his duty or obligations to the said Stickney and Company or to the said complainant, or that he delivered said note and certificates to said Turner in his individual capacity or otherwise than as the president and proper representative of this defendant and in pursuance of the notice and demand served upon him by this defendant, as hereinbefore stated; and this defendant denies that in so doing the said De Koven violated any trust reposed in him, or that he did otherwise than was required of him to do under the terms of the contract between said A. B. Stickney and Company and said Goudy in pursuance of which the papers referred to therein were deposited with him, or that the said De Koven had any interest, agency, or authority in respect to the transfer and disposition of said note and certificates after the same had been surrendered by him to the said Voluntine C. Turner as the president and proper representative of this defendant; but this defendant admits that neither the said Turner nor this defendant paid to the said De Koven any consideration whatever for the transfer and delivery of said note and certificates made by him to this defendant as aforesaid, and insists that by the terms of the several contracts before referred to no consideration for such transfer and delivery was stipulated for or required, and that the serv-
110 ices of the said De Koven as custodian of the said papers was a gratuitous one, undertaken as an accommodation to the par-

ties in interest under written stipulations, with which he fully and literally complied.

This defendant, further answering, admits, upon information and belief, that the new directors of the Chicago and Evanston Railroad Company, to wit, the said defendants, Easton, Wadsworth, Walker, and Hubbard, so elected as aforesaid and claiming to be legally elected as such directors, refuse and since the said election have refused to recognize said Stickney and Company or the said complainant as the holders or owners of the certificates of shares in said company or of any interest therein.

This defendant, further answering, says that it has no knowledge or information respecting the ownership of other certificates of stock in said Chicago and Evanston Railroad Company than those held and disposed of by it as aforesaid, and whether the said A. B. Stickney and Company were at any time the owners of other certificates representing one hundred and ten and two-thirds shares this defendant does not know and is not informed, and therefore cannot answer upon belief or otherwise; and as to all the proceedings of the said Chicago and Evanston Railroad Company, its officers and directors, subsequently to the transfer and delivery of the note of said company and the certificate representing eight hundred and seventy-five shares of the stock by this defendant as
111 aforesaid this defendant has no knowledge and had and took no interest or part in the proceedings or any of them; but this defendant is informed and believes it to be true that since this defendant parted with all of its interest in and control over said certificate the board of directors of said company have regularly made assessments thereon to the full amount of the par value thereof, and that said assessments have been fully paid by the holders thereof and the proceeds applied to the construction of the Chicago and Evanston railroad; that said assessments were made upon all the certificates for stock in said company outstanding at the time the same were made, but as to any forfeitures of certificates held by A. B. Stickney or the said complainant in consequence of a failure to pay such assessments or for any other cause this defendant has no knowledge, information, or belief, and therefore leaves the said complainant to make proof of his allegations in that behalf as he may be advised is proper.

This defendant, further answering, says that it does not know and is not informed except by the statements of said bill, and therefore cannot admit upon belief or otherwise, whether the said A. B. Stickney, prior to the filing of the said bill of complaint or at any other time, either with or without consideration therefor, assigned and transferred to said complainant all or any part of his interest under the several contracts set forth in said bill or any other interest in or related to the said Chicago and Evanston Railroad Company,
112 nor does this defendant know nor is it in any way informed except by the averments of said bill who composed the said firm of A. B. Stickney and Company or who furnished the moneys advanced on account of the said several contracts aforesaid in the interest or for the account of said A. B. Stickney and Company, and

as to all the allegations of said bill in respect to these matters this defendant leaves the said complainant to make proof thereof.

And this defendant, further answering, expressly denies all and all manner of unlawful combination and confederacy wherewith it is charged in and by the said bill of complaint; without that, any matter, cause, or thing in the said bill contained and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to the knowledge or belief of this defendant.

All of which matters and things this defendant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges, &c.

NORTH CHICAGO CITY RAILWAY COMPANY,
By JNO. N. JEWETT, *Its Solicitor.*

JNO. N. JEWETT,
Of Counsel for Def't.

Endorsed: Filed Oct. 1, 1883. Wm. H. Bradley, clerk.

113 On the same day, to wit, on the first day of October, 1883, came V. C. Turner, Ebenezer Buckingham, and Samuel B. Chase, by their solicitor, and filed in said clerk's office their answer in said entitled cause; which said answer is in the words and figures following, to wit:

Answer of Turner et al.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et als.* } In Chancery. Bill for Relief.

The joint and separate answer of Voluntine C. Turner (sued by the name of Volney C. Turner), Ebenezer Buckingham, and Samuel B. Chase, three of the defendants in the above-entitled cause, to the bill of complaint of James J. Hill, complainant therein.

These defendants, now and at all times hereafter saving and reserving unto themselves all and all manner of benefit of advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained, for answer thereto or unto so much and such parts thereof as these defendants are advised it is material or necessary for
114 them to make answer unto, answering, say—

That they admit that on and prior to the 28th day of May, A. D. 1880, there was in existence a corporation organized under the laws of the State of Illinois known as the Chicago and Evanston Railroad Company, possessing powers and privileges usual to such corporations, for the purpose of enabling it to construct, maintain,

and operate a railroad from some point in the city of Chicago to Evanston, both of said termini being in the county of Cook, in said State of Illinois. These defendants also admit that they, at the date aforesaid and for some time prior thereto, had been directors in said corporation and so continued until their resignations of said places, as hereinafter stated, some time in the month of September, A. D. 1882.

These defendants also admit that the capital stock of said company was fixed by its charter at the sum of one hundred thousand dollars, divided into shares of one hundred dollars each, and that on the said 28th day of May, 1880, the said shares, or the right to them, were represented by certain certificates then outstanding, nominally aggregating the full amount of said capital stock, but upon which nothing had been paid to said company, and they were, therefore, liable to assessment for their full par value in the
115 hands of the holders thereof, and so appeared upon the face thereof.

These defendants, further answering, also admit that at the date aforesaid the said defendant, The North Chicago City Railway Company, was the rightful owner of said certificates representing shares in said company to the amount of about eight hundred and eighty-nine and one-third shares, a large portion of which stood in the name of this defendant, Voluntine C. Turner, a part, however, standing in the names of these defendants, Buckingham and Chase, and a part in the names of said defendants, William C. Goudy and George Chandler, but all of the said certificates held by and in the names of said parties to the extent of said eight hundred and eighty-nine and one-third shares were so held in trust for the said defendant, The North Chicago City Railway Company, and subject to its use and control.

These defendants also admit that on the said 28th day of May, A. D. 1880, the said defendants, Goudy and Chandler, were co-directors with these defendants of the said Chicago and Evanston Railroad Company, and that said defendant, Goudy, was president and said Chandler secretary of said company.

These defendants, further answering—the said Turner of his own knowledge and the said Chase and Buckingham upon information and belief—admit it to be true that on the said 28th day of
116 May, A. D. 1880, the said North Chicago City Railway Company held and was the owner of a promissory note of the said Chicago and Evanston Railroad Company for the principal sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78), representing advances made by the said North Chicago City Railway Company for and on account of its interest in said Chicago and Evanston Railroad Company and in the furtherance of the purposes of said last-named company, and that on said day and under the terms and provisions of an agreement of that date with said Goudy the said North Chicago City Railway Company agreed to sell and dispose of the said note and the certificates of shares in the Chicago and Evanston Railroad Company, described in said agreement as about eight hundred and

ninety shares, belonging as aforesaid to the North Chicago City Railway Company, to said Goudy for the sum of twenty-five thousand dollars ($25,000), to be paid to said North Chicago City Railway Company at the time and in the manner stated in said agreement and subject to the conditions in the said agreement set forth, a copy of which said agreement is contained in the answer of the said North Chicago City Railway Company in this cause, to which reference is hereby made for greater certainty as to the provisions thereof.

117 These defendants, further answering upon information and belief, admit that on the said 28th day of May, A. D. 1880, the several contracts referred to in said bill of complaint and pretended copies of which are attached thereto as Exhibits A, B, and C were executed between the parties therein named respectively, but these defendants do not admit the correctness of said exhibits as copies, and leave the complainant to make proof of said contracts as he may be advised is proper.

These defendants, further answering upon information and belief, admit that the said note and a certificate representing eight hundred and seventy-five shares of the eight hundred and eighty-nine and one-third shares of the stock of the Chicago and Evanston Railroad Company, owned by said North Chicago City Railway Company, with other papers, were, on or about the 28th day of May, A. D. 1880, deposited with the said defendant, John De Koven, under the provisions of the contract of that date between said William C. Goudy and the firm of A. B. Stickney and Company, referred to in said bill, and a pretended copy of which is attached to said bill and marked Exhibit C; that at the time of said deposit the said A. B. Stickney and Company well knew and were fully advised that the said note and certificates were the property of the said North Chicago City Railway Company, and were therefore notified of the full

118 extent of the rights of said Goudy in and the authority of said Goudy to make sale and disposition of said note and certificate, and were bound to take notice of the terms of the agreement between said Goudy and said North Chicago City Railway Company by which such rights and authority were conferred.

These defendants also admit that the said North Chicago City Railway Company assented to the deposit of said note and the certificate representing said eight hundred and seventy-five shares with said John De Koven under the contract between said Goudy and said A. B. Stickney and Company, subject, however, to all its rights under its contract with said Goudy above referred to and not otherwise.

That by the provisions of said contract between the said Goudy and the said A. B. Stickney and Company and of the contract between said Goudy and the said North Chicago City Railway Company said last-named company was entitled to a transfer and delivery of said note and certificate from said De Koven to itself in case the sum of twenty-five thousand dollars should not be paid to said John De Koven for the said North Chicago City Railway Company within four months from the first day of March, A. D. 1881,

by the said A. B. Stickney and Company or other persons representing them; and these defendants deny, upon information
119 and belief, that the said sum of twenty-five thousand dollars or any part thereof was paid by said A. B. Stickney and Company or any other person on their behalf to the said John De Koven or to any one for him within the time aforesaid or at any other time, or that the same or any part thereof was ever tendered to said De Koven by the said Stickney and Company in pursuance of their contract with said Goudy, or that said Goudy ever paid or offered to pay to said De Koven or to said North Chicago City Railway Company said sum of twenty-five thousand dollars or any part thereof in accordance with the terms of said contracts.

And these defendants, further answering, expressly deny that they or either of them ever had any knowledge, information, or notice of any negotiations or arrangements, if any such there were, between said Goudy and said Stickney and Company for an extension of the time for the completion of said contracts or any or either of them referred to in said bill of complaint or of any claims of the said Stickney and Company in that behalf until they were notified of such claims by the filing of said bill, or that they or either of them were ever applied to for or in any manner assented to such extension, or that the said Goudy had any authority from these defendants or from the North Chicago City Railway Company to grant such ex-
120 tension to the prejudice of the rights of these defendants or of the said last-named company in respect to the payment of said sum of twenty-five thousand dollars.

These defendants, further answering—the said Turner of his own knowledge and the said Buckingham and Chase upon information and belief—say that the said note and certificate representing eight hundred and seventy-five shares in said Chicago and Evanston Railroad Company remained in the custody of said John De Koven until some time in the month of June, A. D. 1882; that on or about the 8th day of said month, no portion of the said sum of twenty-five thousand dollars having been paid or tendered to the said John De Koven or to said North Chicago City Railway Company, as was required by the contracts aforesaid, and the time for said payment having long prior thereto elapsed, the said North Chicago City Railway Company caused a notice and demand in writing to be served upon said De Koven for the transfer and delivery of said note and certificate for shares to said North Chicago City Railway Company accompanying said notice and demand with a copy of the contract aforesaid between said company and said Goudy, and that in pursuance of said notice and demand the said note and certificate were by the said De Koven transferred and delivered to said com-
121 pany, and thereby the said company became reinvested not only with its original right and title in and to said note and certificate but also with the sole possession and absolute right of control and disposition over the same.

And these defendants, further answering, the said Turner of his own knowledge and the said Buckingham and Chase upon information and belief, admit that the said North Chicago City Rail-

way Company, after being repossessed of the said note and certificate as aforesaid, agreed to sell the same to said Goudy for the sum of twenty-five thousand dollars, to be paid on or before the first day of October, A. D. 1882; that said Goudy thereupon entered into negotiations with the said defendant Easton and others respecting the sale of said note and certificate owned by the said North Chicago City Railway Company, and, said negotiations resulting successfully, the said North Chicago City Railway Company, by this defendant Turner, its president and managing representative, deposited the said note and certificate with the Commercial National Bank of Chicago, with authority to deliver the same to said Goudy or said defendant Walker upon the payment to said bank for said railway company of the said sum of twenty-five thousand dollars; that said money was subsequently paid to said bank and received by said railway company and said note and certificate delivered by
122 said bank in pursuance of the terms of said deposit; that thereupon and at the request of the parties purchasing said note and certificate these defendants resigned their places as directors in said Chicago and Evanston Railroad Company and have since had no interest therein or connection therewith.

These defendants also admit upon information and belief that the defendants, George Chandler and William C. Goudy, resigned their directorships in said Chicago and Evanston Railroad Company at or about the same time and upon like request of the purchasers of said note and certificate.

These defendants, further answering, say that they do not know who were elected to fill vacancies in the board of directors of said Chicago and Evanston Railroad Company, occasioned by the resignations of these defendants and said Goudy and Chandler, but they are informed and believe and therefore admit it to be true that said defendants Easton, Walker, Wadsworth, and Hubbard were elected as such directors and consented to serve in that capacity; that said defendant Merrill was elected as a director of said company, but absolutely refused to serve as such. These defendants are informed that said defendant Johnson was never elected or pretended to act as a director of said company.

These defendants, further answering, say that they did not
123 nor did either of them take any part or have any interest in the negotiations between said Goudy and said A. B. Stickney and Company or between said Goudy and said Easton and his associates, and they expressly deny each, every, and all of the charges of combination, collusion, and conspiracy set forth in said bill for the purpose of defrauding the said A. B. Stickney and Company or the said complainant or for any other purpose; and they further say that they do not know whether the said Easton, Walker, and Wadsworth and their associates were, in the purchase of said note and certificate, acting for and in the interest of the said Chicago, Milwaukee and St. Paul Railroad Company or not, or whether they have since been so acting, but these defendants are informed that such is not the fact.

These defendants, further answering, expressly deny any and all

unlawful combination and conspiracy with which they are charged in and by said bill of complaint, without that any matter or thing in said bill alleged and not herein and hereby well and sufficiently answered unto, confessed and avoided, traversed or denied, is true to the knowledge or belief of these defendants.

All of which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasona-
124 ble costs and charges about their suit in this behalf most wrongfully sustained.

VOLUNTINE C. TURNER,
EBENEZER BUCKINGHAM,
SAMUEL B. CHASE,
By JNO. N. JEWETT,
Their Solicitor.

JNO. N. JEWETT,
Of Counsel for said Defendants.

Endorsed: Filed Oct. 1, 1883. Wm. H. Bradley, clerk.

On the same day, to wit, on the first day of October, 1883, came the Chicago and Evanston Railroad Company, by its solicitor, and filed in said clerk's office its answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

125 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

Separate Answer of The Chicago and Evanston Railroad Company, One of the Defendants.

JAMES J. HILL
v.
THE CHICAGO & EVANSTON RAILROAD COMPANY *et al.*

The separate answer of the Chicago and Evanston Railroad Company, impleaded with others, to the bill of complaint of James J. Hill.

This defendant, now and at all times hereafter saving and reserving to itself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary to make answer unto, answering, says:

This defendant admits that on the 28th day of May, 1880, it had a nominal capital stock as fixed by its charter of one thou-
126 sand shares, of which no part had been paid, and that certificates of the following form—that is to say:

Chicago and Evanston Railroad Company.

No. —. Shares, one hundred dollars. Shares —.

CHICAGO, —— —, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of — dollars on each share. Said shares are transferable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary.*

—had been issued to several persons as evidence of their right to said stock on making full payment thereof and as an obligation on the part of the holders thereof to make such payment; that each one of said certificates recited on its face that no amount had been paid on the shares of stock mentioned in said certificate.

And this defendant admits that on the day last mentioned the North Chicago City Railroad Company held the promissory note of this defendant for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents; and this defendant says upon information and belief that of said certificates so
127 issued those representing eight hundred and eighty-nine and one-third shares belonged to and were controlled by the North Chicago City Railway Company, and that a certificate for one hundred and ten and two-thirds shares belonged to and was controlled by Edwin Haskins.

And this defendant admits that on the 28th day of May, 1880, William C. Goudy, Voluntine C. Turner, Ebenezer Buckingham, Samuel B. Chase, and George Chandler were directors, and that on that day or subsequently thereto John W. Ela and Thomas Parker, Jr., were elected as two additional directors to fill vacancies then existing.

And this defendant admits that on the 28th day of May, 1880, it entered into and made a contract with A. B. Stickney and Co., a substantial copy of which is attached to the bill of complaint as Exhibit "B," but this defendant says that the said copy is not entirely accurate, and reserves the right to produce the original on the hearing of this case for the purpose of correcting any errors therein.

And this defendant admits that on said 28th day of May, 1880, it entered into a contract with William C. Goudy, a substantial copy of which is attached to the bill of complaint as Exhibit "A," but this defendant reserves the right to produce the original on the trial of this case for the purpose of correcting any errors
128 appearing in said copy.

And this defendant, further answering the bill of complaint, says that the said A. B. Stickney and Co., as well as the said William C. Goudy, failed to perform and comply with the terms and conditions of said contracts, and that by reason of their defaults

each of said contracts has expired and ceased to be binding upon this defendant.

And this defendant admits that, by its proper officers, it issued to John De Koven, trustee, on the 28th day of May, 1880, a certificate of the character hereinbefore mentioned upon the surrender of other certificates for an equal number of shares—for eight hundred and seventy-five shares of the capital stock of this defendant—and says that said certificate was subsequently, on the — day of September, 1882, surrendered and a new certificate instead thereof was issued to J. C. Easton, trustee, for the same amount.

And this defendant, further answering the bill of complaint, says that among the certificates issued for stock which recited on their face that the full amount was unpaid were two on the 28th day of May, 1880, for one share each, to John W. Ela and Thomas Parker, Jr., and that on the 30th day of September, 1881, the certifi-
129 cate issued to Edwin Haskins for one hundred and ten and two-thirds shares was surrendered and a new certificate of like character, reciting that said stock was unpaid, was issued for the same number of shares to A. B. Stickney.

And this defendant, further answering the bill of complaint, says that on the 4th day of September, 1882, an assessment was made upon all the shares of the capital stock of this defendant of the full amount thereof, and a call was made upon the holders of said certificates for the payment in full on or before the 15th day of September, 1882; that notice of such call was given and served on the holders of said certificates in the manner provided by the by-laws of said company, and that in response to said call the holders of all of said certificates, except A. B. Stickney, John W. Ela, and Thomas Parker, Jr., paid the amount of the several shares of stock held or claimed by them in full; that on the 20th day of September, 1882, the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., having failed to make any payment whatever in accordance with the said demand and call in pursuance of the terms of subscription of stock and the by-laws of said company, at a meeting of the directors held on that day, the shares of stock held by them severally were declared for-
feited to the company, and the president and secretary were
130 authorized to sell the said shares to other persons on payment of the amount due thereon, and that since that time the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., have had no interest as subscribers of stock or holders of stock or of certificates of stock in the Chicago and Evanston Railroad Company.

And this defendant, further answering the bill of complaint, says that at a meeting of the directors held on the 4th day of September, 1882, one of the directors, Ebenezer Buckingham, tendered his resignation, which was accepted, and Edwin Walker was elected to fill the vacancy created thereby; and at a meeting of said directors held on the 5th day of September, 1882, Samuel B. Chase, one of the directors, resigned and Jason C. Easton was elected to fill the vacancy created thereby; and that at the same time Voluntine C. Turner resigned and S. S. Merrill was chosen to fill the vacancy thereby created; and at the same time George Chandler resigned as director

and secretary and Tertius W. Wadsworth was elected director to fill said vacancy; and at the same time William C. Goudy resigned as director and president and Elijah K. Hubbard was elected director to fill said vacancy; and that on the same day Jason C. Easton was elected president of this defendant and Tertius W. Wads-
131 worth secretary and treasurer; and subsequently on the — day of January, 1883, at an annual meeting of the stockholders held at that time and in the manner provided by the by-laws, said by-laws having provided that the number of directors at said election should be reduced to five, Jason C. Easton, Edwin Walker, Tertius W. Wadsworth, Elijah K. Hubbard, and S. S. Merrill were elected directors of this defendant, and all of said persons accepted the positions and have acted as such, except S. S. Merrill, who declined to accept the office of director.

And this defendant, further answering the bill of complaint, says that on the 29th day of November, 1882, in pursuance of a notice given in accordance with the constitution and laws of Illinois, the charter and by-laws of this defendant, a meeting was held by the stockholders, and at such meeting the capital stock was increased from one hundred thousand dollars to one million dollars, and since that time certificates of full-paid stock have been issued to purchasers thereof on payment of the amount in full.

And this defendant, further answering the bill of complaint, says that immediately after the change of directors, on the 5th day of September, 1882, it proceeded to obtain the right of way from the northern limits of the city of Chicago to the village of Evanston, and to cause the line of road to be partially completed within
132 the city of Chicago and to be constructed on the line selected from Chicago to Evanston; that the money paid in in response to the assessment and call and produced by the sale of new stock after the increase thereof has been used and applied in payment of rights of way and the construction of said road; that at the time the bill herein was filed a large amount had been expended in procuring rights of way and in construction, and that the entire line from the junction of Larrabee street and Hawthorn avenue, in the city of Chicago, to Calvary cemetery has now been completed, and this defendant has proceeded to purchase property and condemn rights of way in the city of Chicago to enable it to construct its line from the junction of Larrabee street and Hawthorn avenue southerly to and across the north branch of the Chicago river and to the Union depot, situated in the city of Chicago, at the corner of Canal and Adams streets, and in doing so has expended large sums of money; all of which have been paid in by the persons purchasing and taking stock in the Chicago and Evanston Railroad Company.

And this defendant, further answering the bill of complaint, denies, as alleged in said bill, that the call for the payment of stock made, as hereinbefore stated, on the 4th day of September, 1882, and the subsequent forfeiture of the stock of said A. B. Stickney,
133 John W. Ela, and Thomas Parker, Jr., were made for any fraudulent pretense or purpose whatever, but avers that such assessment and call were made and forfeiture declared in accord

ance with the power conferred by law and the terms of subscription of stock and the by-laws of the company, and the said assessment and call were made for the purpose of paying debts and liabilities of said company, then incurred or that might thereafter be incurred, for right of way and for the construction of the road of this defendant, and that the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., each had actual notice of said call and assessment and the opportunity to make payment of the amounts for which they were severally liable, and upon making payment thereof would have become entitled to certificates of full-paid stock, but that they failed and neglected to respond to said call or to pay any sum whatever thereon.

And this defendant, as to all other matters and things in the bill of complaint contained, says that it has no knowledge or information and belief, and therefore neither admits nor denies the same, but leaves the complainant to make such proof as he may be advised is necessary and proper in this case.

And now, having fully answered the bill of complaint, this defendant prays to be dismissed hence with its reasonable costs in this behalf sustained.

CHICAGO AND EVANSTON RAILROAD COMPANY,
By E. WALKER, *Sol.*

134 Endorsed: Filed Oct. 1, 1883. W. H. Bradley, cl'k.

135 On the same day, to wit, on the first day of October, 1883, came John De Koven, by his solicitor, and filed in said clerk's office his answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

Answer of John De Koven.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery. Bill for Relief.

The separate answer of John De Koven, one of the defendants in said cause, to the bill of complaint of James J. Hill, complainant therein.

This defendant, now and at all times hereafter saving and reserving unto himself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained, for answer thereto or unto so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says that he has not now and never has had any personal beneficial interest in any of the several con-

tracts, certificates, and other papers referred to in said bill of
136 complaint, nor any personal or beneficial interest in the business, railroad, stocks, or moneys represented by them, nor has he any knowledge or information respecting the past or present organization known as the Chicago and Evanston Railroad Company, nor did he ever at any time have or claim to have any right thereto or interest therein as a stockholder or otherwise.

This defendant, further answering, denies that he has had or took any part in the negotiations between the said firm of A. B. Stickney and Company and the said William C. Goudy referred to in said bill or any part thereof, or that he had any interest therein or any knowledge or information thereof whilst the same were pending or until after the same were consummated, as this defendant supposes, by the execution of the papers or contracts referred to in said bill as Exhibts A, B, & C, nor did this defendant at any time after the execution of said contracts have any information respecting said negotiations or the result thereof except as he acquired the same in the manner and for the purposes hereinafter stated.

This defendant, further answering, also denies any and all knowledge, information, or notice of or participation in any negotiations between said A. B. Stickney and Company and said Goudy or others of the said defendants in respect to the subject-manner of said contracts or either of them subsequently to the execution thereof
137 or of any change or modification in any or either of them, as the result of negotiations or otherwise, or that the said A. B. Stickney and Company ever claimed or pretended that any such change or modification thereof had been made until he was advised of such claim or pretension by the filing of the bill of complaint in this case, long after this defendant had ceased to be the custodian of said papers, as hereinafter set forth.

This defendant, further answering, expressly denies any combination, collusion, or conspiracy on his part with all or any or either of the other defendants named in said bill for the purpose of defrauding the said A. B. Stickney and Company or the said complainant or for any other purpose connected with the transactions referred to in said bill or otherwise, or that he ever did any act or thing in relation to the subject-matter of said bill which he was not authorized and required to do by the terms and provisions of the papers deposited with him as custodian or trustee, as hereinafter stated.

This defendant, further answering, admits that on or about the 28th day of May, A. D. 1880, he consented, at the request of the said defendant, William C. Goudy, and others, to take the custody and charge of certain contracts relating to the said Chicago and Evanston Railroad Company and a certain note of said company and certificates for shares of stock therein, which, as this de-
138 fendant is informed and believes, are the same contracts and note and certificates referred to in said bill of complaint, and that this defendant accepted such custody subject to the terms and provisions of the contract between said A. B. Stickney and Company and said William C. Goudy referred to in said bill, and a pretended copy of which is attached thereto as "Exhibit C;" but whether said

exhibit is a correct copy of said contract this defendant, for want of information, neither admits nor denies, but leaves the said complainant to make proof thereof as he is advised is proper.

That this defendant accepted said trust solely as a matter of accom-odation to the parties requesting him so to do and without any knowledge of the relations of the said parties thereto, except as shown upon the face of said papers, and without any personal interest therein; that the said papers remained in the custody of this defendant, as depositary or trustee thereof as aforesaid, from the time the same were so received by him until some time in the summer of the year 1882, and that during all that time this defendant had no knowledge, information, or notice of any kind or from any person of any change or modification of said papers or any of them or of any facts indicating any such change or modification.

That about the first day of June, A. D. 1882, the said Wil-
139 liam C. Goudy demanded of this defendant a transfer and delivery of the said papers so placed in the custody of this defendant to him; that neither the said A. B. Stickney and Company nor the said complainant nor any person representing them or either of them had, prior to said demand of said Goudy or at any time subsequently thereto, conferred with this defendant in respect to said papers or any of them or paid or tendered to this defendant any sum or sums of money whatever; that immediately following the demand of said Goudy for the transfer and delivery of said papers to him this defendant for the first time examined the said papers, and more especially the contract between said A. B. Stickney and Company and said Goudy, under the terms of which the said papers were lodged with this defendant, and caused the same te be submitted to his attorney, E. B. McCagg, Esq., of Chicago, for his advice to this defendant in the premises, and this defendant was advised by his said attorney that under the circumstances and according to the terms and provisions of said contract between said A. B. Stickney and Company and said Goudy he was bound to transfer and deliver the said papers to said Goudy; that before such transfer and delivery to said Goudy was made and on or about the 8th day of June, A. D. 1882, a notice and demand was served upon this defendant by and on behalf of the North
140 Chicago City Railway Company for the transfer and delivery of the note of the Chicago and Evanston Railroad Company and the certificates for shares in said company, which were a part of the papers held as aforesaid by this defendant, to the said North Chicago City Railway Company, attached to which said notice and demand was a copy of a contract between the said North Chicago City Railway Company and said Goudy in relation to said note and certificates for shares, a copy of which said notice and demand and of said contract are set out in the answer of the said North Chicago City Railway Company in this case, to which answer reference is hereby made for further particulars of the terms of said notice and contract.

This defendant, further answering, admits that he did afterwards and long prior to the filing of said bill of complaint (but at what

particular date he is now unable to state), upon the notice and demand of the North Chicago City Railway Company aforesaid, and with the knowledge and consent of said Goudy and without any knowledge or notice of any change or modification in said contracts or either of them or of any postponement of the time for the performance thereof or any notice or information of the claims of said A. B. Stickney and Company or of the said complainant, as set forth in said bill of complaint, transfer and deliver the said note of the
141 said Chicago and Evanston Railroad Company and the certificates for stock in said company so received and held by him as aforesaid to the said defendant, V. C. Turner, for the said North Chicago City Railway Company, the said Turner being at that time the president and proper representative of said last-named company, since which time this defendant has no knowledge or information respecting the disposition thereof, nor has he had any interest in or control over the same or any part thereof.

And this defendant, further answering, says that in all the matters aforesaid, so far as he has had any connection therewith, he has acted in the utmost good faith towards all parties interested and, as he insists, in strict accordance with the terms and provisions of the contract under which the said papers and securities were deposited with him, and, expressly denying all fraud, collusion, confederation, and conspiracy with which he is charged in and by said bill of complaint, or that any matter or thing in said bill alleged and not herein and hereby fully answered unto, confessed and avoided, traversed or denied, is true to the knowledge or belief of this defendant, he humbly prays to be hence dismissed with his reasonable costs and charges about his suit in this behalf most wrongfully sustained.

JOHN DE KOVEN,
By JNO. N. JEWETT, *His Sol'r.*

JNO. N. JEWETT,
Of Counsel for Def't De Koven.

142 Endorsed: Filed Oct. 1, 1883. Wm. H. Bradley, clerk.

143 On the same day, to wit, on the first day of October, 1883, came Jason C. Easton, Edwin Walker, T. W. Wadsworth, and Elijah K. Hubbard, by their solicitors, and filed in said clerk's office their answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

Answer of Easton et al.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The joint and several answer of Jason C. Easton, Edwin Walker, Tertius W. Wadsworth, and Elijah K. Hubbard.

The joint and several answer of Jason C. Easton, Edwin Walker, Tertius W. Wadsworth, and Elijah K. Hubbard, defendants, to the bill of complaint of James J. Hill.

These defendants, respectively, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained, for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say—

144 That on and for some time prior to the 28th day of May, A. D. 1880, there was and had been a corporate organization, under a special charter granted by the General Assembly of the State of Illinois, known as the Chicago and Evanston Railroad Company, and the stock of said company consisted nominally of one thousand shares of one hundred dollars each, and that, as representing said shares, certain certificates had been issued by said company in the following form—that is to say:

Chicago and Evanston Railroad Company.

No. —. Shares, one hundred dollars. Shares, —.

CHICAGO, ——, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of — dollars on each share. Said shares are transferrable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary.*

That certificates in the form above set forth, but which showed on the face thereof that no payment had been made on account of the same, properly signed by the officers of said company,

145 had been issued and were outstanding on the said 28th day of May, A. D. 1880, to the amount of about one thousand shares,

and certificates representing eight hundred and eighty-nine of said shares were held and owned or absolutely controlled in the interest of or by the North Chicago City Railway Company, which also on the day aforesaid held the promissory note of said Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78), given for moneys advanced to said company.

That said certificates so issued and all the other certificates for stock in said company then outstanding were subject to assessment for the full par value thereof and could not be assigned or transferred on the books of said company until all assessments thereon had been paid.

And these defendants, further answering, say that the certificates above described and which had been issued and were outstanding on the said 28th day of May, 1880, represented the whole of the capital stock authorized by the charter of the Chicago and Evanston Railroad Company.

That the North Chicago City Railway Company owned and controlled eight hundred and eighty-nine ⅛ shares, the certificates therefor being held by Voluntine C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, and William C. Goudy and others as trustees for said North Chicago City Railway Company.

146 That Voluntine C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, and William C. Goudy were then directors of the Chicago and Evanston Railroad Company.

That on or about that date John W. Ela and Thomas Parker, Jr., were elected as additional directors to fill vacancies existing in the board.

And these defendants, upon information and belief, admit that on the 28th day of May, 1880, a contract was made between the Chicago and Evanston Railroad Company and A. B. Stickney under the name of A. B. Stickney and Co., and that another contract was made on the same day between said company and William C. Goudy, substantial copies of which are attached to the bill of complaint, marked Exhibits "A" and "B," but these defendants say that they are advised that there are verbal errors in said copies and reserve the right to show the same upon the hearing of this case.

And these defendants, further answering the bill of complaint, admit, upon information and belief, that on the said 28th day of May, 1880, a contract was made and entered into between the said William C. Goudy and A. B. Stickney under the name of A. B. Stickney and Co., a substantial copy of which is attached to the bill of complaint, marked Exhibit "C," but as to said copy these defendants are informed that there are errors therein and reserve the right to show the same upon the trial of this case.

147 And these defendants have no knowledge or information and belief as to who the said A. B. Stickney represented or was authorized to represent in the making of said contracts, or whether the complainant, James J. Hill, was a party thereto or

not, and therefore neither admit nor deny the allegations of the bill with reference thereto.

And these defendants admit that the said John De Koven mentioned as trustee in said contract marked Exhibit "C" accepted the trust and received the certificate of stock, note, and assignment mentioned in said contracts as trustee thereof and became liable to account for the said certificate, note, and assignment in accordance with the provisions of said contract and not otherwise; and they say that the said John De Koven had not then, or at any other time before or since, any other or different interest in the said certificate of stock, note, and assignment.

And these defendants, further answering the bill of complaint, say that they have no knowledge or information and belief as to what payment of money, if any, was made, as alleged in the bill, to the said William C. Goudy, and therefore they neither admit nor deny the statements of the bill with regard thereto.

And these defendants, further answering the bill of complaint, say, upon information and belief, that the said William C. Goudy made default on his part in the performance of said contract and did not procure the right of way, as he had agreed to do,
148 within three months after the first day of March, 1881, and that the said A. B. Stickney did not, nor any one for him, pay or offer to pay said installments of twenty thousand dollars and fifteen thousand dollars, nor pay or offer to pay the alternative payment of twenty-five thousand dollars within four months after the first day of March, 1881; and so these defendants say that whatever right or interest had been acquired by the said A. B. Stickney for himself or the complainant or any other person by reason of said contracts ceased and expired on the 1st day of July, 1881, and that since that time he nor they have had any interest whatever in the certificates of stock issued by the Chicago and Evanston Railroad Company or the said promissory note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents, or the said assignment made by the said Goudy, or in the franchises, property, or effects of the Chicago and Evanston Railroad Company.

And these defendants, further answering the bill of complaint, say, upon information and belief, that the said certificate of stock for eight hundred and seventy-five shares and the promissory note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents were owned by and belonged exclusively to the North Chicago City Railway Company; and that the said William C. Goudy had no right, title, or interest therein, except as a
149 purchaser from said company, and that he was not entitled to a delivery or control of the same until he had paid the sum of twenty-five thousand dollars therefor, which he failed to do either by himself or through the said A. B. Stickney or A. B. Stickney and Co., according to the terms of said contract mentioned in the bill; and, therefore, on or about the 10th day of June, 1882, the North Chicago City Railway Company demanded of the said John De Koven, trustee, the possession of the certificate of stock and note, and the said John De Koven, trustee, acting strictly according to the

terms of the contract and the trust with reference to said certificate and note, delivered the same to the North Chicago City Railway Company, and then and thereby all right, title, and interest of the said A. B. Stickney or A. B. Stickney and Co., or the complainant or any other person claiming with or by or through them ceased; and since that time neither they nor any one or more of them have had any right or interest in and to the same.

And these defendants, further answering the bill of complaint, upon information and belief deny that the time for said Goudy to obtain said right of way, or of the said A. B. Stickney or A. B. Stickney and Co., to make the payments specified in said contract was extended, by mutual agreement or otherwise; and they deny that the said Goudy applied to the said Stickney or A. B.
150 Stickney and Co. to extend said time or made the representations alleged in the bill; and they deny that the said William C. Goudy and Voluntine C. Turner entered into a secret negotiation with these defendants or either of them for the sale and transfer to them of eight hundred and seventy-five shares of stock in the Chicago and Evanston Railroad Company and the franchises and control and management of said company and for the sale and transfer of the said promissory note and claim of said William C. Goudy; and they deny that the said Turner, Goudy, and De Koven transfer-ed and delivered the said eight hundred and seventy-five shares of stock and the control and management of said company and said note and claim to these defendants, as alleged in the bill; and they deny that these defendants or any of them were acting for or in the interest of the Chicago, Milwaukee and St. Paul Railway Company in any of the transactions set forth in the bill of complaint, or that said Chicago, Milwaukee and St. Paul Railway Company had any interest whatever in the stock of the Chicago and Evanston Railroad Company, its franchises, property, or effects, or in the promissory note of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents; and these defendants expressly deny that they or any or either of them acquired any right, title, or
151 interest in and to the stock of the Chicago and Evanston Railroad Company, its franchises, property, or effects, or in said promissory note or in said claim in the way and manner set forth and alleged in the bill of complaint; but, on the contrary, these defendants aver the facts to be that the North Chicago City Railway Company was the owner and holder of eight hundred and eighty-nine and one-third shares of the stock of the Chicago and Evanston Railroad Company, as represented by the certificates hereinbefore mentioned, nothing having been paid thereon, and that the remaining one hundred and ten and two-thirds shares, as represented by a like certificate, were owned and held by one Edwin Haskins, the same having nothing paid thereon and being subject to assessment for the full par value thereof, and that the Chicago and Evanston Railroad Company was indebted to the North Chicago City Railway Company in the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents, as evidenced by a promissory note mentioned in the bill of

complaint, and that on or about the 1st day of July, 1882, the North Chicago City Railway Company agreed to sell all of its right and interest in and to the said eight hundred and eighty-nine and one-third shares of stock, the same being unpaid and subject to assessment, and the said promissory note to the —

152 William C. Goudy for the sum of twenty-five thousand dollars cash, the said certificates of stock and note to be delivered to him upon the payment being made therefor on or before the 1st day of October, 1882, and afterwards, on or about the 8th day of August, 1882, the said William C. Goudy agreed with the defendant-, Jason C. Easton and John W. Cary, to cause to be transferred to them eight hundred and eighty-nine shares of the capital stock of the Chicago and Evanston Railroad Company and to procure the resignation of the directors of said company and cause the vacancies to be filled by such persons as said Easton and Cary might designate, and in consideration therefor the said Easton and Cary agreed to pay to the said Goudy, on the transfer of said shares and the change of directors, a certain sum of money and to construct and put in operation the railway of the Chicago and Evanston Railroad Company by a day mentioned; that the said Easton and Cary were then advised that the said shares of stock and promissory note belonged to the North Chicago City Railway Company, and were held by and would not be delivered until the sum of twenty-five thousand dollars was paid to said company for the said shares of stock and note, and that afterwards, on the 19th day of August, 1882, the North Chicago City Railway Company, at the request of said Goudy,

153 deposited in escrow with the Commercial National Bank of Chicago one of said certificates for eight hundred and seventy-five shares of stock and the said promissory note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents, inclosed in an envelope on which the following indorsement was made: "This envelope, with its contents, is to be delivered to Edwin Walker or W. C. Goudy upon the payment of twenty-five thousand dollars ($25,000.00) on or before Sept. 5th, 1882, and in case of failure in making such payment this envelope and contents is to be returned to me Aug. 19, 1882;" that afterwards and on the 5th day of September, 1882, the defendant Easton deposited in said bank more than twenty-five thousand dollars and drew his check against the same, payable to the said Voluntine C. Turner, for the North Chicago City Railway Company, and delivered the said check to said Turner and received from said bank the said certificate of stock and note, and said check was duly paid by said bank to said North Chicago City Railway Company.

And these defendants, further answering the bill of complaint, deny any notice whatever of any contract made by and between the said Goudy and Stickney or A. B. Stickney and Co. or any other person in their behalf or in behalf of either of them by which the time of performance on the part of said Goudy or by said A. B.

154 Stickney or A. B. Stickney and Co. was extended beyond the times fixed in the written contracts mentioned in the bill of complaint, and they deny any knowledge or notice of any

rights, interest, or title of the complainant or of said A. B. Stickney or A. B. Stickney and Co. in and to the stock, franchises, property, and effects of the Chicago and Evanston Railroad Company or to said promissory note other or different from that which appears on the face of the written contracts mentioned in the bill of complaint and attached as exhibits thereto.

And these defendants, further answering the bill of complaint, deny that any meeting of the stockholders was held as alleged in the bill, at which stock was voted for these defendants or any other persons as directors, but they say that on the 4th day of September, 1882, a meeting of the directors was held at which Ebenezer Buckingham resigned, and the defendant, Edwin Walker, was elected as a director in his place, and that on the 5th day of September, 1882, a meeting of the directors was held in pursuance of notice given to all of the directors, and at said meeting Samuel B. Chase resigned, and the defendant, Jason C. Easton, was elected in his place; that Voluntine C. Turner resigned and S. S. Merrill was elected in his place; that George Chandler resigned as secretary and director and Tertius W. Wadsworth was elected as a director to succeed him, and that William C. Goudy resigned as president and director and Eiljah K. Hubbard was elected a director in his place; that there-
155 upon the defendant, Jason C. Easton, was elected president and Tertius W. Wadsworth secretary and treasurer, but that S. S. Merrill declined to accept the position of director or to act as such.

And these defendants say that the said William C. Goudy, at the request of the said Easton and Cary transferred one share of stock to the said Edwin Walker, one share to Tertius W. Wadsworth, one share to Elijah K. Hubbard, and one share to S. S. Merrill, and seven and one-third shares to the defendant Easton.

And these defendants, further answering the bill of complaint, say that the said Jason C. Easton and John W. Cary in making said contract of purchase with the said William C. Goudy represented and acted for certain persons, but did not act for and represent in said transaction the Chicago, Milwaukee and St. Paul Railway Company; that the defendant Easton did not receive the said certificates of stock in his own right alone, but received them for himself and certain other persons; that the persons whom he so represented were George Smith, Julius Wadsworth, Hugh T. Dickey, J. Milbank, Selah Chamberlain, William Rockefeller, J. Stillman, J. T. Woodward, and E. L. Frank; that the certificate for eight hundred and seventy-five shares and the certificate for seven and one-third shares were transferred to him as trustee for himself and the persons
156 named aforesaid; that on the 20th day of September, 1882, he surrendered said certificates, which were canceled, and received instead thereof a certificate for eight hundred and seventy-five shares, issued to him as a trustee, and on the same day the said certificate for eight hundred and seventy-five shares, so issued to the defendant Easton as trustee, was by him surrendered and canceled and instead thereof certificates for full-paid stock were issued to George Smith, Julius Wadsworth, Hugh T. Dickey, J. Milbank,

Selah Chamberlain, William Rockefeller, J. Stillman, J. T. Woodward, and E. L. Frank, each for seventy shares, and to the defendant Easton for fifty shares, and to the defendant Easton another certificate, as trustee for other parties, for one hundred and ninety-five shares, and at the same time the certificates held by the defendants Easton, Walker, Wadsworth, and Hubbard, each for one share, were surrendered and canceled and new certificates for full-paid stock were issued, each for one share, and afterwards the defendant Easton transferred to Hugh T. Dickey and J. Milbank each fifty shares held by him as trustee, and on the 1st day of December, 1882, certificates of full-paid stock were issued to the said Dickey and Milbank for the same.

And these defendants, further answering the bill of complaint, say that on the 4th day of September, 1882, the board of
157 directors made an assessment on all of the stock of said company and issued a call for the full payment thereof to be paid to the treasurer on or before the 15th day of that month; that the owners and holders of said stock responded to said call and paid the full amount thereof, except A. B. Stickney, John W. Ela, and Thomas Parker, Jr., who, although duly notified of said call, neglected and failed to make any payment whatever; and afterwards, at a meeting of the board of directors held on the 20th day of September, 1882, in pursuance of the terms of subscription of stock and the by-laws of said company, the shares claimed or held by the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., were declared forfeited to the company and authority was given to the officers to sell the said stock to other persons for the par value thereof, and thereby all right, title, and interest of the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., ceased and ended and they have had since no right or interest in the stock of said company.

And these defendants, further answering the bill of complaint, say that on the 28th day of May, 1880, the said A. B. Stickney requested the said Goudy to purchase from Edwin Haskins his certificate for one hundred and ten and two-thirds shares, and in pursuance of said request the said Goudy purchased the same on
158 the 3rd day of July, 1880, and subsequently delivered said certificate to A. B. Stickney, who, on the 30th day of September, 1881, surrendered the same and received instead thereof a certificate for the like number of shares in his own name and held said certificate at the time said assessment and call were made and until the same was declared forfeited as aforesaid; and these defendants deny that said assessment was made for any fraudulent purpose, but, on the contrary, aver that it was made in accordance with law, the charter and by-laws of said company, for the purpose of providing the means of carrying on the legitimate business of the corporation.

And these defendants, further answering the bill of complaint, say that on the 29th day of November, 1882, in pursuance of a call issued on the 26th day of September, 1882, a meeting of the stockholders of the Chicago and Evanston Railroad Company was held to consider the question of increasing the capital stock; that at said meeting a vote was taken at which nine hundred and fifty-four

shares of the one thousand shares voted in favor of increasing the capital stock to one million of dollars; that since that time stock has been issued and sold at the par value thereof when required to raise money for prosecuting the business of the corporation.

159 And these defendants, further answering the bill of complaint, say that after the capital stock had been increased from one hundred thousand dollars to one million dollars, as aforesaid, shares of stock were sold on the 1st and 30th days of December, 1882, the 5th day of March, the 1st day of June, and the 2nd day of July, 1883, for the full par value thereof, paid to the Chicago and Evanston Railroad Company in cash, and certificates were issued and delivered therefor, so that said company has received for its shares of stock four hundred and forty-four thousand and three hundred dollars, and that Julius Wadsworth owns and holds five hundred and sixty-two shares, J. Milbank five hundred and sixty shares; Hugh T. Dickey, George Smith, J. Stillman, Selah Chamberlain, William Rockefeller, J. T. Woodward, and E. L. Frank each owns and holds four hundred and twenty shares, J. C. Easton two hundred and fifty-three shares; J. C. Easton, trustee, one hundred and twenty-five shares; Edwin Walker, Tertius W. Wadsworth, and Elijah K. Hubbard each one share; and these defendants say that for each and every one of said shares the full par value thereof was paid to the treasurer of the Chicago and Evanston Railroad Company at the time of the delivery of the several certificates.

160 And these defendants, further answering the bill of complaint, say that Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, and William Rockefeller were on and before the 8th day of August, 1882, and have been since citizens and residents of the State of New York; that Selah Chamberlain was then and has been since a citizen and resident of the State of Ohio; that Elijah K. Hubbard, Tertius W. Wadsworth, and Edwin Walker were then and have been since citizens and residents of the State of Illinois; that George Smith is an alien, residing in London, England, and that J. C. Easton is now a citizen and resident of the State of Wisconsin.

And these defendants, further answering the bill of complaint, say that immediately after the change of directors on the 5th day of September, 1882, the Chicago and Evanston Railroad Company proceeded to purchase property, to acquire rights of way, and to construct its road, and the moneys received for the stock hereinbefore mentioned has been used for the payment of said property, rights of way, and the construction of the road; that before the bill herein was filed large sums of money had been expended, and since the filing of the bill the company has proceeded in good faith to carry out the objects of its charter, and now expects to put its entire line in operation in a short time.

And the defendants, Edwin Walker, Elijah K. Hubbard, and Tertius W. Wadsworth, say, each for himself, that he is the holder of one share of stock in order to qualify him to act as director in the interest of the stockholders hereinbefore mentioned, and

161 that he has no other or further interest in said company or

its stock; and the defendant, Edwin Walker, says for himself that he was not a party to the contract of purchase made by Jason C. Easton and John W. Cary, but acted as an attorney-at-law for them and the parties they represented, and in no other way.

And these defendants, further answering, say that they have no knowledge or information and belief as to whether the said A. B. Stickney made an assignment or transfer of all his right, title, and interest under and by virtue of the contracts set forth in the bill of complaint and all stocks and property covered by said contracts, and also said one hundred and ten and two-thirds shares of stock, to the complainant, James J. Hill, and therefore they cannot answer the allegations of the bill with reference thereto, but they say upon information and belief that the said A. B. Stickney had no right or interest therein to transfer and assign.

And these defendants deny all other matters and things stated in said bill of complaint necessary or material to be answered unto by them or either of them, and which have not been herein answered.

And now, having fully answered the said bill of complaint, these defendants pray to be dismissed hence, with their costs in this behalf sustained.

JASON C. EASTON,
EDWIN WALKER,
162 TERTIUS W. WADSWORTH,
ELIJAH K. HUBBARD,
By WALKER AND CARTER, *Solicitors.*

Endorsed: Filed Oct. 1, 1883. W. H. Bradley, cl'k.

On the same day, to wit, on the first day of October, 1883, came Wm. C. Goudy, by his solicitor, and filed in said clerk's office his answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

163 *Separate Answer of William C. Goudy, One of the Defendants.*

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

The separate answer of William C. Goudy, one of the defendants to the bill of complaint of James J. Hill, complainant.

This defendant, now and at all times hereafter saving and reserving to himself all and all manner of benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said bill of complaint contained, for answer thereto or to so much and such parts thereof as this defendant is advised it is material or necessary to make answer unto, answering, says—

That on and for some time prior to the 28th day of May, A. D. 1880, there was and had been a corporate organization, under a special charter granted by the General Assembly of the State of Illinois, known as the Chicago and Evanston Railroad Company, and the stock of said company consisted nominally of one thousand shares of one hundred dollars each, and that as representing said shares certain certificates had been issued by said company in the following form—that is to say:

164 Chicago and Evanston Railroad Company.

No. —. Shares, one hundred dollars. Shares, —.

CHICAGO, ——, 18—.

This certifies that —— —— — entitled to — shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of — dollars on each share. Said shares are transferable on the books of the company by —— —— or — attorney on the surrender of this certificate, provided all installments due thereon shall have been paid.

—— ——, *President.*

—— ——, *Secretary.*

That certificates in the form above set forth, but which showed on the face thereof that no payment had been made on account of the same, properly signed by the officers of said company, had been issued and were outstanding on the said 28 day of May, A. D. 1880, to the amount of about one thousand shares, and certificates representing eight hundred and eighty-nine of said shares were held and owned or absolutely controlled in the interest of or by the North Chicago City Railway Company, which also, on the day aforesaid, held the promissory note of said Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78), given for moneys advanced to said company; that said certificates so issued and all the other certificates for stock in said company then outstanding were subject to assessment for the full par value thereof
165 and could not be assigned or transferred on the books of said company until all assessments thereon had been paid.

This defendant, further answering, says that the certificates above described and which had been issued and were outstanding on the said 28th day of May, 1880, represented the whole of the capital stock authorized by the charter of the Chicago and Evanston Railroad Company; that the North Chicago City Railway Company owned and controlled eight hundred and eighty-nine shares, the certificates therefor being held by Voluntine C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, and this defendant and others as trustees for said North Chicago City Railway Company; that Voluntine C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham and this defendant were then directors of the Chicago and Evanston Railroad Company.

This defendant, further answering, denies that eight hundred and seventy shares or a controlling interest in the Chicago and Evanston Railroad Company were, on and prior to the 28th day of May, 1880, in the possession and under the control of this defendant, and that the said promissory note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78) was in the possession and under the control of this defendant with authority to dispose of the same or either of them or any part thereof in any manner which he might deem expedient, as alleged in the bill; but, on the contrary, this defendant says that a short time before
166 that date the North Chicago City Railway Company, so being the owner of said shares of stock and note, agreed to sell all of the shares aforesaid held, owned, or controlled by it, and also a debt due by the Chicago and Evanston Railroad Company to the North Chicago City Railway Company, being the same evidenced by the said note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents ($36,847.78) for the sum of twenty-five thousand ($25,000.00) cash, the said shares and debt to be transferred to him on payment of the money, it being understood that this defendant should have some time, which was to be determined by the North Chicago City Railway Company at its pleasure, to sell the same to some other parties in order to provide himself the means of making such payment, but the full possession and control of the said shares and indebtedness were to remain with the North Chicago City Railway Company until the complete payment was made by this defendant of the said sum of twenty-five thousand dollars ($25,000.00); and a few days before the said 28th day of May, 1880, this defendant, being then in negotiation with the said A. B. Stickney, reported such fact to the president of the North Chicago City Railway Company, and stated that the said Stickney would not be able to pay a sufficient sum to enable this defendant to pay the said sum of twenty-five thousand dollars ($25,000.00) at that time, but that he could arrange to have said sum paid by the said Stickney in installments, and, the said president having expressed a
167 disposition to make such arrangement, this defendant proceeded with his negotiations and finally submitted drafts of the papers composing the agreement between this defendant and A. B. Stickney, as set forth as exhibits to the bill of complaint, to the North Chicago City Railway Company, and thereupon an agreement was prepared to be executed by this defendant and the said North Chicago City Railway Company, and was executed by them on the same day that the several papers set forth as Exhibits "A," "B," and "C" to the bill of complaint were signed, and which agreement in writing reads as follows:

This article of agreement, made and entered into this 28th day of May, 1880, by and between the North Chicago City Railway Company, party of the first part, and William C. Goudy, party of the second part, witnesseth:

That the party of the first part hereby sells and assigns to the party of the second part all the interest it has in the shares of the

capital stock of the Chicago and Evanston Railroad Company, being about eight hundred and ninety shares, and also a promissory note or obligation of the Chicago and Evanston Railroad Company to the party of the first part for the sum of thirty-six thousand eight hundred and forty-seven ($36,847.78) dollars and seventy-eight cents without recourse.

And the party of the second part agrees to pay to the party of the first part the sum of twenty-five thousand dollars ($25,000.00) therefor, as follows, to wit:

The eight hundred and seventy-five shares of stock shall be assigned to John De Koven as trustee and the said note or obligation shall be assigned and delivered to him as trustee, to hold the same until the said sum of twenty-five thousand ($25,000.00) dollars shall be paid to the said John De Koven as trustee, under a contract of even date herewith between A. B. Stickney and Co. and the party of the second part, or until there shall be default in the payment of the sum of fifteen thousand ($15,000) dollars and twenty thousand (20,000) dollars or twenty-five thousand (25,000) dollars, as therein provided.

And it is further agreed by the parties hereto that there
168 be paid from the payment of fifteen thousand (15,000) dollars mentioned in said contract between the said A. B. Stickney and Co. and the party of the second part the sum of twelve thousand five hundred (12,500) dollars, and from the payment of twenty thousand (20,000) dollars mentioned therein the further sum of twelve thousand (12,500) five hundred dollars, making the whole amount of said twenty-five thousand (25,000) dollars.

And in case said payments of fifteen and twenty thousand dollars shall not be made because of the default of the party of the second part and the said A. B. Stickney & Co. shall pay the sum of twenty-five thousand (25,000) dollars in lieu thereof, as provided in said contract, then the whole of said sum of twenty-five thousand (25,000) dollars shall be paid to the party of the first part.

When said payment of twenty-five thousand (25,000) dollars is fully made to the party of the first part all its interest in said stock and note shall cease and be subject to the order and control of the party of the second part. If the said sum of twenty-five thousand (25,000) dollars shall not be paid as aforesaid, then the said shares of stock and evidence of indebtedness shall be assigned and delivered by the said John De Koven, trustee, to the said party of the first part or to such person as it shall designate.

The said contract between the said A. B. Stickney and Co. and the said party of the second part which is deposited with said John De Koven is referred to for greater certainty.

This agreement shall be an order to the said John De Koven, trustee, to pay the sum of twenty-five thousand (25,000) dollars as aforesaid to the party of the first part, and in default to assign said eight hundred and seventy-five shares of stock and said note to the party of the first part.

In witness whereof the said party of the first part has executed this contract by its president and secretary and affixed its seal and

the party of the second part has affixed his signature the day and year first above written.

NORTH CHICAGO CITY R'Y CO.,
By V. C. TURNER, *President.*
[L. S.] HIRAM CRAWFORD, *Secretary.*
WILLIAM C. GOUDY.

169 And this defendant, further answering, says that the only right, power, or authority that he had over the said shares of stock or said promissory note was contained in and fixed by the agreement hereinbefore set forth, and that the North Chicago City Railway Company was not to surrender or deliver to this defendant the said shares or note or any part thereof until the said sum of twenty-five thousand dollars was fully paid to said company; that a certificate for eight hundred and seventy-five of said shares was procured by this defendant from the Chicago and Evanston Railroad Company in the name of John De Koven, trustee, and said certificate, with said promissory note, was deposited by the North Chicago City Railway Company with the said John De Koven, trustee, according to the provisions of the several papers mentioned as Exhibits "A," "B," and "C" to the bill of complaint and the agreement hereinbefore set forth, to be held by him until the said sum of twenty-five thousand dollars should be paid for the use of the North Chicago City Railway Company, and in default thereof the said certificate and note to be returned to said North Chicago City Railway Company.

And this defendant, further answering, says that the rights of the North Chicago City Railway Company and of this defendant to the said note and certificate were well known to and understood by the said A. B. Stickney before and at the time of the execution of the several contracts set out in the bill of complaint, and that the 170 terms and conditions of the said agreement hereinbefore set forth between this defendant and the North Chicago City Railway Company were fully made known to the said A. B. Stickney.

And this defendant, further answering, admits that a contract dated May 28th, 1880, between this defendant and the said A. B. Stickney, under the name of A. B. Stickney and Co., was executed, and that Exhibit "C," attached to the bill of complaint, is substantially a copy thereof, and that on the same day an agreement was executed between the said A. B. Stickney, by the name of A. B. Stickney and Co., and the Chicago and Evanston Railroad Company, a substantial copy of which is attached to the bill of complaint as Exhibit "B," and that on the same day an agreement was executed by and between the Chicago and Evanston Railroad Company and this defendant, a substantial copy of which is attached to the bill of complaint as Exhibit "A;" that said papers were executed at the same time and as a part of the same transaction; but this defendant says that said copies attached to the bill of complaint as exhibits are not correct transcripts thereof, and he reserves the right to offer in evidence the originals and have all errors in said copies corrected.

And this defendant, further answering, denies that the said contract was made by the said A. B. Stickney and complainant, James J. Hill, or by or with any other person than the said A. B. Stickney; but this defendant says that the said A. B. Stickney, while
171 the negotiations were pending, stated to this defendant that he did not himself have the pecuniary ability to carry out and perform the stipulations contained in said contract on his part; that certain persons residing at St. Paul, Minnesota, of large wealth and of pecuniary responsibility had agreed to furnish the means to make payment to this defendant and to build said railroad, but that they did not wish to be disclosed in connection with the project. The said A. B. Stickney also stated that they were known to the cashier of the First National Bank of St. Paul and had authorized him to furnish information which would be satisfactory to this defendant, and thereupon this defendant addressed to H. P. Upham, cashier, a letter of inquiry, which is as follows:

WASHINGTON, D. C., *April* 15, 1880.

SIR: I am requested by Mr. A. B. Stickney, of St. Paul, to ask you the following questions:

First. Is Mr. Stickney authorized to make a contract with the Chicago and Evanston Railroad Company for certain persons and himself, under the name of A. B. Stickney and Co., so as to legally bind all of them?

Second. Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?

Third. Have they furnished you their names and authorized you to give the information called for by the two preceding questions?

An immediate answer to me at 162 Washington St., Chicago, will oblige

Yours respectfully, W. C. GOUDY.

172 To the cashier of 1st National Bank of St. Paul.

And he received the following answer thereto:

ST. PAUL, MINNESOTA, *April 19th*, 1880.

W. C. Goudy, Esq., 162 Washington street, Chicago, Ills.

SIR: Your letter of 15th inst. is rec'd. You ask, first, "Is A. B. Stickney authorized to make a contract with the Chicago and Evanston Railroad Company for certain persons and himself, under the name of A. B. Stickney and Co., so as to legally bind all of them?" He is authorized; I do not know about the use of the name A. B. Stickney "and Co."

You ask, second, "Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?" They are, beyond any question whatever.

You ask, third, "Have they furnished you their names and authorized you to give the information called for by the two preceding questions?" Yes; as follows (copy of letter to me dated Apr-l 19, 1880): "We, the undersigned, hereby guarantee the ability of A. B.

Stickney to carry out and perform a certain contract with the Chicago and Evanston R. R. Co., mentioned in a letter from W. C. Goudy, dated Washington, D. C., Ap'l 15, 1880." All parties concerned are of the highest respectability and are men who will keep any engagement entered into. If the trade is made with Mr. Stickney you can depend upon its being carried out to the letter, as agreed.

Resp'y, H. P. UPHAM, *C'r.*

And the defendant says that the persons who signed said guaranty or letter as mentioned in the letter of H. P. Upham aforesaid were not then disclosed to this defendant and never have been made known to him, except that the said Stickney in the month of June, 1882, stated to this defendant that the complainant, James J. Hill, was one of them.

And this defendant says that he relied upon the statements of the said A. B. Stickney and on the representations made in the
173 letter of said H. P. Upham, and, so relying, entered into the contract set forth as Exhibit "C" in the bill of complaint.

And this defendant says that the action of the said A. B. Stickney in making and signing said contract has never been, so far as this defendant knows, confirmed; but, on the contrary, this defendant says, on information and belief, that the said James J. Hill never did confirm the same or bind himself by any valid agreement with the said A. B. Stickney to carry out and perform said agreement, and never authorized the said Stickney to make any further or other agreement.

And this defendant, further answering, says that the said John De Koven was requested to act as trustee by the president of the North Chicago City Railway Company, and that the said A. B. Stickney and this defendant consented to his election; that the said De Koven accepted the said trust and received the certificate of stock, note, and assignment specified in said contracts, and thereby as trustee thereof became liable to account for the said certificate, note, and assignment in accordance with the provisions of said contracts and not otherwise, and the said De Koven had not then or at any other time before or since any other or different interest in the said certificate of stock, note, and assignment.

And this defendant, further answering, says that prior to time of the making of said contracts the Chicago and Evanston Railroad Company had acquired some rights of way by ordinances of the city within the limits of the city of Chicago, but had secured no right of way elsewhere; that it was proposed to construct said road from the city limits as near as practicable along the shore of Lake
Michigan on a route then indicated to the village of Evans-
174 ton, and that it was known by the said A. B. Stickney that money would be required for the purpose of procuring the said right of way, and in order to place this defendant in funds for the purpose of paying damages or purchasing right of way, as well as part payment on the contract itself, the said A. B. Stickney, at the time of making the contracts, on the 28th day of May, 1880, paid to

And this defendant, further answering, denies that the said contract was made by the said A. B. Stickney and complainant, James J. Hill, or by or with any other person than the said A. B. Stickney; but this defendant says that the said A. B. Stickney, while
171 the negotiations were pending, stated to this defendant that he did not himself have the pecuniary ability to carry out and perform the stipulations contained in said contract on his part; that certain persons residing at St. Paul, Minnesota, of large wealth and of pecuniary responsibility had agreed to furnish the means to make payment to this defendant and to build said railroad, but that they did not wish to be disclosed in connection with the project. The said A. B. Stickney also stated that they were known to the cashier of the First National Bank of St. Paul and had authorized him to furnish information which would be satisfactory to this defendant, and thereupon this defendant addressed to H. P. Upham, cashier, a letter of inquiry, which is as follows:

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SIR: I am requested by Mr. A. B. Stickney, of St. Paul, to ask you the following questions:

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You ask, second, "Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?" They are, beyond any question whatever.

You ask, third, "Have they furnished you their names and authorized you to give the information called for by the two preceding questions?" Yes; as follows (copy of letter to me dated Apr-l 19, 1880): "We, the undersigned, hereby guarantee the ability of A. B.

Stickney to carry out and perform a certain contract with the Chicago and Evanston R. R. Co., mentioned in a letter from W. C. Goudy, dated Washington, D. C., Ap'l 15, 1880." All parties concerned are of the highest respectability and are men who will keep any engagement entered into. If the trade is made with Mr. Stickney you can depend upon its being carried out to the letter, as agreed.

Resp'y, H. P. UPHAM, *Cr.*

And the defendant says that the persons who signed said guaranty or letter as mentioned in the letter of H. P. Upham aforesaid were not then disclosed to this defendant and never have been made known to him, except that the said Stickney in the month of June, 1882, stated to this defendant that the complainant, James J. Hill, was one of them.

And this defendant says that he relied upon the statements of the said A. B. Stickney and on the representations made in the
173 letter of said H. P. Upham, and, so relying, entered into the contract set forth as Exhibit "C" in the bill of complaint.

And this defendant says that the action of the said A. B. Stickney in making and signing said contract has never been, so far as this defendant knows, confirmed; but, on the contrary, this defendant says, on information and belief, that the said James J. Hill never did confirm the same or bind himself by any valid agreement with the said A. B. Stickney to carry out and perform said agreement, and never authorized the said Stickney to make any further or other agreement.

And this defendant, further answering, says that the said John De Koven was requested to act as trustee by the president of the North Chicago City Railway Company, and that the said A. B. Stickney and this defendant consented to his election; that the said De Koven accepted the said trust and received the certificate of stock, note, and assignment specified in said contracts, and thereby as trustee thereof became liable to account for the said certificate, note, and assignment in accordance with the provisions of said contracts and not otherwise, and the said De Koven had not then or at any other time before or since any other or different interest in the said certificate of stock, note, and assignment.

And this defendant, further answering, says that prior to time of the making of said contracts the Chicago and Evanston Railroad Company had acquired some rights of way by ordinances of the city within the limits of the city of Chicago, but had secured no right of way elsewhere; that it was proposed to construct said road from the city limits as near as practicable along the shore of Lake Michigan on a route then indicated to the village of Evans-
174 ton, and that it was known by the said A. B. Stickney that money would be required for the purpose of procuring the said right of way, and in order to place this defendant in funds for the purpose of paying damages or purchasing right of way, as well as part payment on the contract itself, the said A. B. Stickney, at the time of making the contracts, on the 28th day of May, 1880, paid to

this defendant the sum of twenty thousand dollars; and this defendant says that he proceeded after the making of said contracts to negotiate for the right of way between the city of Chicago and Calvary cemetery, as specified in the contract by him with the Chicago and Evanston Railroad Company; that he rendered services in the effort to procure said right of way and in conducting said negotiations, and that he performed various professional services according to his agreement, as alleged in said bill, but he admits that he did not obtain the right of way from the city of Chicago to Calvary cemetery within the time agreed upon in his contract with the Chicago and Evanston Railroad Company and with the said A. B. Stickney, and he admits that he did not perform his contract as to procuring said right of way before the 1st day of June, 1881.

And this defendant, further answering, avers that by reason of his default the alternative provision of his contract with the said A. B. Stickney took effect, by which the said A. B. Stickney had the right to pay twenty-five thousand dollars to John De Koven, trustee, within four months after the first day of March, 1881; and this defendant says that the said A. B. Stickney did not himself
175 or by the said complainant or any other person exercise the privilege given by said contract of paying the sum of twenty-five thousand dollars or any part thereof to the said John De Koven, trustee as aforesaid, within four months after the first day of March, 1881, and thereby all right and interest which had been acquired by virtue of said contract by A. B. Stickney or A. B. Stickney and Co. or any other person under him ended, and by express terms of said contract and the agreement between this defendant and the North Chicago City Railway Company the said note and certificate of stock were to be returned by the said John De Koven to the North Chicago City Railway Company.

And this defendant, further answering, says that about the 1st of May, 1882, he applied to the said John De Koven, trustee, for the certificate of stock, note, and assignment, and claimed that by the terms of the contract the said John De Koven was bound to deliver them to this defendant, and thereupon the said John De Koven submitted the questions to his attorney for advice, who advised him that all rights and interests of the said A. B. Stickney or A. B. Stickney and Co. had ceased, and that by the terms of the trust the said John De Koven was obliged to deliver the said papers to this defendant; and this defendant says that in making such application he did not intend to claim the ownership of the said certificate of stock or note as against the North Chicago City Railway Company or make the application with a view of obtaining the same and making any disposition thereof, but that his object was to se-
176 cure the possession in the interest of the said North Chicago City Railway Company, and on receiving the same to deliver them in accordance with the agreement hereinbefore set forth to that company, but before the said John De Koven had actually surrendered the control of said certificate, note, and assignment to this defendant Voluntine C. Turner, the president of the North Chicago City Railway Company, having learned that this defendant had

made application to the said De Koven as aforesaid, served upon the said De Koven, on the 8th day of June, 1882, a written demand for the certificate and note, and furnished him at the same time a copy of the agreement between the North Chicago City Railway Company and this defendant, hereinbefore set forth; and thereupon the said John De Koven did return and deliver the said certificate and note, duly assigned, without recourse, to the said Voluntine C. Turner as president of the North Chicago City Railway Company; and this defendant avers that he had prior to such surrender and delivery of said certificate and note no interest, right, or claim in and to the same or either of them except as is shown by the agreement between him and the North Chicago City Railway Company, set forth in this answer aforesaid, and that as he had failed and the said A. B. Stickney had failed to make payment of said sum of twenty-five thousand dollars or any part thereof that all right and interest in and to the said certificate and note or either of them had ceased, and the same became the property of the
177 North Chicago City Railway Company precisely as they were before any of said contracts had been made.

And this defendant, further answering, denies that after the said contracts of May 28th, 1880, were executed he ever applied to the said Stickney or A. B. Stickney and Co. for further time in which to perform his agreement to obtain said right of way. He denies that he ever represented that no interest would suffer by delaying the obtaining of said right of way until the spring of 1882. He denies that it was ever agreed and understood between him and the said Stickney or the said Stickney and Co. that he might have more time than that mentioned in the contract, and that said Stickney or Stickney and Co. should proceed in the spring of 1882 to construct said road. He denies that from time to time during the winter of 1881 and the spring and summer of 1882 the said Stickney and Co. or Stickney applied to this defendant to be informed as to how he was getting on in obtaining said right of way. He denies that the time for the mutual performance of the covenants in said agreement contained was by mutual agreement waived and extended from time to time. This defendant denies that he represented in any way whatever the said John De Koven, trustee, or that he represented or was authorized to represent the North Chicago City Railway Company in regard to said contracts or any extension thereof of May 28th, 1880, or that he was authorized or represented in any way the Chicago and Evanston Railroad Company in reference to said contract or any extension thereof.

178 And this defendant, further answering, says, as to all the allegations of the bill of complaint in regard to notice that a default had occurred on the part of this defendant in procuring the right of way or on the part of the said Stickney or A. B. Stickney and Co. in making the alternative payment of twenty-five thousand dollars, this defendant denies the statements of the bill with reference thereto and says that the said A. B. Stickney had a duplicate copy of the said contract attached to the bill as Exhibit "C," together with duplicate copies of the contracts marked Exhibits "A"

and "B," and knew the contents thereof; that prior to the 20th day of December, 1881, his attention was actually called to the fact that the time for procuring the right of way and making the alternative payment had expired, and that by the terms of the contract all right and interest conferred thereby on him had ceased; that about the 5th day of May, 1882, the said Stickney was informed and knew that this defendant claimed that he had no further interest in the said shares of stock or note or assignment, and that whatever rights he had had thereto had expired according to the terms and provisions of said contract on the first day of July, 1881; that on or about the 16th day of June, 1882, the said Stickney was informed in a personal interview with this defendant that his rights or the rights of himself and those who were associated with him had expired, and also that all right and control of this defendant over the said shares of stock and note had also expired, and
179 that said certificate for shares of stock and note deposited with the said John De Koven as trustee had been returned by him to the North Chicago City Railway Company, who was then in the possession of the same and claimed to be the sole owner thereof, and that this defendant had no authority or power at that time to make any arrangement with reference to the same; and this defendant avers, upon information and belief, that the said Stickney immediately thereafter gave information of the facts stated by this defendant to the complainant, James J. Hill, and yet neither the said A. B. Stickney nor the said James J. Hill or any person for them ever offered, on receiving such information or afterwards until the filing of the bill of complaint herein, to make payment of any sum of money whatever upon the said contract set forth in the bill of complaint.

And this defendant, further answering, admits that his codefendant, Voluntine C. Turner, was one of the directors of the Chicago and Evanston Railroad Company and was and is largely interested as a stockholder in the North Chicago City Railway Company and the president of said company, but he denies that in the month of August, 1882, or at any other time this defendant and said Turner were in secret negotiations with the defendants Easton, Walker, Wadsworth, Hubbard, and Merrill for the sale and transfer to them of the said eight hundred and seventy-five shares of stock and the control and management of the Chicago and Evanston Rail-
180 road Company and said promissory note, and he denies that about the same time this defendant, Turner, and De Koven transferred and delivered or caused to be transferred and delivered the said eight hundred and seventy-five shares of stock of the Chicago and Evanston Railroad Company deposited with De Koven and the control and management of said company and said note to the defendants Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill, as alleged in the bill of complaint; but this defendant says that after all his right, title, and interest in and to the shares of stock of the Chicago and Evanston Railroad Company and the said promissory note hereinbefore mentioned had expired and the defendant lost his claim thereto under and by virtue of the contracts

mentioned hereinbefore, about the 1st day of July, 1882, the North Chicago City Railway Company, by an entirely new and distinct arrangement, agreed to sell to this defendant about eight hundred and ninety shares of stock of the Chicago and Evanston Railroad Company, represented as aforesaid by the certificates upon which no payment had been made, and the said note of thirty-six thousand eight hundred and forty-seven dollars and seventy eight cents for the sum of twenty-five thousand dollars, to be paid in cash on the assignment and delivery of the certificates and note, on or before the 1st day of October, 1882; and afterwards, on or about the 8th day of August, 1882, this defendant entered into an agreement with Jason C. Easton and John W. Cary by which he agreed to cause
181 to be transferred to the said Easton and Cary eight hundred and eighty-nine shares of the capital stock of the Chicago and Evanston Railroad Company represented by the said certificates, and the control of said company as represented in the board of directors; and this defendant says that he was not then informed as to who, if any, person the said Easton and Cary represented, but he has since been informed and believes that they did not represent and were not acting for and in behalf of the Chicago, Milwaukee, and St. Paul Railway Company.

And this defendant further says that after making the said contract with said Easton and Cary he requested the president of the North Chicago City Railway Company to deposit the said certificate of stock for eight hundred and seventy-five shares which had been issued to John De Koven, trustee, and by him assigned to the said Voluntine C. Turner, as president of said company, and the said promissory note for thirty-six thousand eight hundred and forty-seven dollars and seventy-eight cents in the Commercial National Bank of Chicago, to be delivered by said bank upon payment of the sum of twenty-five thousand dollars, and thereupon the said Voluntine C. Turner, as president of the said North Chicago City Railway Company, inclosed said certificate of stock for eight hundred and seventy-five shares in an envelope, together with said promissory note, which he sealed up and endorsed thereon the following: "This envelope, with its contents, is to be delivered to Edwin Walker or W. C. Goudy upon the payment of twenty-five thousand ($25,000.00) dollars
182 on or before September 5th, 1882, and in case of failure in making such payment this envelope and contents is to be returned to me. Aug. 19, 1882;" and delivered the same to the said national bank, where it remained until the 5th day of September, 1882, when the said Jason C. Easton deposited in said bank said sum of twenty-five thousand dollars, and delivered to said Voluntine C. Turner, as president of the North Chicago City Railway Company, a check for said amount, and the said envelope, with its contents, was delivered by said bank to the said J. C. Easton; and this defendant says that he never had the possession or control of the said certificates of stock or promissory note in any other way or manner whatever, and that he was not entitled to the possession or control thereof at any time, except upon the full payment of twenty-five thousand dollars by the said Stickney, according to the terms of the contracts set forth in the

bill of complaint, or by the said Easton and Cary as hereinbefore stated; and this defendant further says that at the same time the payment of twenty-five thousand dollars was made to the North Chicago City Railway Company a further sum was paid to this defendant according to the terms of the contract of sale made by him and the said Easton and Cary.

And this defendant says that Edwin Walker, mentioned as one of the persons to whom the certificate and note were to be delivered by said bank, represented, as this defendant is informed and believes,

183 the said Easton and Cary as attorney-at-law, and had no personal interest whatever in the transaction, and his name was used upon the said envelope as the representative of the said Easton and Cary, they being absent from the city; but that the said certificate and note were delivered, in fact, to the said Jason C. Easton in person.

And this defendant says, upon information received since the sale and transfer of said certificate and his belief that the said Easton and Cary, in making said purchase, were acting for certain other persons not parties to this suit, *and* that said Easton received said certificate of stock and note as a trustee for them, to wit, George Smith, Julius Wadsworth, Hugh T. Dickey, J. Milbank, Selah Chamberlain, William Rockefeller, J. Stillman, J. T. Woodward, and E. L. Frank.

And this defendant, further answering, says, on information and belief, that the said certificate of stock so delivered to the said Easton was, and on the same day, by him surrendered to the Chicago and Evanston Railroad Company and new certificates issued to other persons, whose names are unknown to this defendant, and he does not know what interest the said Easton in fact had or retained in and to the stock of said company, and he also says that at the same time this defendant caused to be transferred to such persons as the said Easton directed—but whom this defendant cannot now remember—twelve additional shares, as represented by the same certificates.

And this defendant, further answering, admits that on the 28th day of May, 1880, this defendant, Voluntine C. Turner, Sam-

184 uel B. Chase, George Chandler, and Ebenezer Buckingham were the directors of the Chicago and Evanston Railroad Company, and that in pursuance with the terms of said contract with the said A. B. Stickney and Co., there being two vacancies in the board of directors, which then consisted of seven members, John W. Ela and Thomas Parker, Jr., were elected directors to fill said vacancies at the request of the said A. B. Stickney, and at the same time, in order to qualify them to hold said position, this defendant assigned one share to the said Ela and one share to the said Parker, both of said certificates and shares belonging at the time to the North Chicago City Railway Company, as was well known to the said A. B. Stickney and the said Ela and Parker; and this defendant admits that on the said 28th day of May, 1880, he was the president and George Chandler the secretary of the Chicago and Evanston Railroad Company.

And this defendant denies that he, together with the said Stickney & Co., as alleged in the bill, owned substantially all of the stock of said company except said eight hundred and seventy-five shares; but, on the contrary, he avers the truth to be that said capital stock was nominally one hundred thousand dollars, divided into shares of one hundred dollars each; that no part of said stock had been paid; that it was represented by certain certificates issued to different persons, who received the same subject to assessment for the full amount thereof; that of said certificates eight hundred and
185 eighty-nine and one-third shares were owned by and belonged to the North Chicago City Railway Company, but the certificates were issued to different persons, who held them exclusively for the use and benefit and subject to the control of said North Chicago City Railroad Company; that the remaining one hundred and ten and two-thirds shares belonged to Edwin Haskins, and that after the said contract of May 28th, 1880, had been entered into the said A. B. Stickney requested this defendant to purchase the certificate of said stock belonging to the said Edwin Haskins for him, and in pursuance of such request, on the 3d day of July, 1880, this defendant did purchase from the said Edwin Haskins the said certificate for one hundred and ten and two-thirds shares, and the said Haskins then signed a blank authority to transfer said certificate of stock, and this defendant paid him therefor two hundred and fifty dollars, which sum the said A. B. Stickney subsequently refunded to him; and this defendant says that nothing had ever been paid on the said shares of stock so held by and purchased from the said Edwin Haskins, as the said A. B. Stickney then well knew, and he received the same subject to assessment for the full par value thereof.

And this defendant, further answering the bill of complaint, denies that any meeting of stockholders was held at which stock was voted for Easton, Wadsworth, Walker, Hubbard, Merrill, and Johnson, as stated in the bill, but he says that on the 5th day of September, 1882, a meeting of the directors was held in pursuance of notice
186 given to all the directors according to the by-laws, including the said John W. Ela and Thomas Parker, Jr., and that at said meeting resignations were tendered and accepted of Samuel B. Chase, Ebenezer Buckingham, George Chandler, Voluntine C. Turner, and this defendant, and Jason C. Easton, Tertius W. Wadsworth, Edwin Walker, Elijah K. Hubbard, and S. S. Merrill were elected as directors to fill such vacancies; and this defendant states, on information and belief, that thereafter S. S. Merrill declined to accept the position of director, and that Jason C. Easton was elected president and Tertius W. Wadsworth secretary and treasurer; and this defendant further states, upon information and belief, that at the time fixed by the by-laws for the next meeting an election was had by the stockholders of said company, when certain persons were elected directors, but this defendant is not informed and cannot state who such directors were, except that the said Easton continues to act as president and the said Wadsworth as secretary and treasurer; and this defendant, upon information and belief, denies that the persons who are directors of the Chicago and Evanston Railroad Company

are acting for and in the interest of the Chicago, Milwaukee and St. Paul Railway Company; and this defendant denies that the said Easton and Cary or either of them or any person for whom they acted in purchasing the control of the Chicago and Evanston Railroad Company had notice of any subsisting contract or rights of the complainant or of the said A. B. Stickney and Co. or A. B. Stickney, as alleged in the bill of complaint.

187 And this defendant, further answering the bill of complaint, denies that he, Turner, Chandler, Chase, Buckingham, and De Koven, or any of them, conspired and confederated together to defraud the said A. B. Stickney or A. B. Stickney and Co. and the complainant or any of them and induced the said Stickney and Co. to enter into the contract attached to the bill as Exhibit "C" and to pay said sum of twenty thousand dollars to this defendant; but, on the contrary thereof, this defendant says that none of said persons had any interest whatever in the payment or receipt of the said sum of twenty thousand dollars except this defendant; and he further says that the said sum of twenty thousand dollars was intended by the parties to said contract to place this defendant in the control of funds to pay for services, expenses, and damages required in procuring the right of way from the city of Chicago to Calvary cemetery.

And this defendant, further answering the bill of complaint, denies that he made no *bona fide* efforts to procure the said right of way; but, on the contrary, he avers that he proceeded with diligence and in good faith to obtain the right of way as he had agreed to do; that he spent personally a great deal of time, employed others who rendered services and expended considerable sums of money in and about the effort to obtain such right of way; that he carried on negotiations with the owners of property, the municipal authorities of the town of Lake View and the village of Rogers Park, filed petitions to condemn property, and by these means had accomplished a great deal in the way of performing his contract; all of

188 which was well known to the said A. B. Stickney, to whom this defendant from time to time made reports of his proceedings; and in this manner this defendant earned or spent a large sum of money which the payment of twenty thousand dollars made under said contract set forth in the bill was intended to meet. This defendant claims that, by the express terms of the contract set forth in the bill, he received and was entitled to hold the twenty thousand dollars so paid to him without any right of the said A. B. Stickney or A. B. Stickney and Co. to repayment of the same or any part thereof, and it was intended by said contract to give the said A. B. Stickney the right to take the control of the Chicago and Evanston Railroad Company, including its property and right of way, upon making the payments provided in said contract, and if the said A. B. Stickney had made the alternative payment of twenty-five thousand dollars, as he had the right to do, he would thereby have secured the benefit of all the rights of way, labor, and expenses which had been procured and expended by this defendant with the aid of said sum of twenty thousand dollars; and, inasmuch as the said A. B.

Stickney did not avail himself of his pri vilege under the contract to make said payment and thereby secure the results flowing from the services and expenditures of this defendant in procuring the said right of way, he lost the opportunity of protecting himself from loss in the payment of said sum of twenty thousand
189 dollars; and this defendant avers that the complainant has no other or better rights with regard thereto than the said A. B. Stickney.

And this defendant, further answering the bill of complaint, admits that the said A. B. Stickney held the possession of a certificate of stock for one hundred and ten and two-thirds shares, issued to him instead of the said certificate issued to and assigned by said Edwin Haskins as aforesaid, but he says that an assessment was made on all the stock of said company by the board of directors, requiring the full payment thereof within ten days after notice; that a copy of the resolution making said assessment and demand for payment was served upon and received by the said A. B. Stickney in the manner provided by the by-laws, and also that such notice and demand was given to John W. Ela and Thomas Parker, Jr., as well all other persons who claimed to hold said certificates of stock; that all of said holders except said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., responded to such call and made payment in full; and, upon information and belief, this defendant says that in pursuance of the subscription of stock and the by-laws of the company the shares so held by the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., were declared forfeited to the company before the filing of the bill of complaint.

And this defendant, further answering the bill of complaint,
190 says, on information and belief, that immediately after the transfer of the control of the Chicago and Evanston railroad as aforesaid, on the 5th day of September, 1882, the said Easton and his associates proceeded in good faith and contributed money to procure the right of way and construct the railway of said company, and that before the bill of complaint was filed herein several miles of track had been actually laid and the company was proceeding in good faith to complete the entire line, equip, and put in operation, all of which was well known to the said A. B. Stickney and the complainant.

And this defendant, further answering, says that he has no knowledge or information and belief as to whether the said A. B. Stickney made any assignment or transfer of all his right, title, and interest under and by virtue of the contracts set forth in the bill of complaint and all stock and other property covered by said contracts, and also the said one hundred and ten and two-thirds shares of stock, to the complainant, and therefore he cannot answer the allegations of the bill with reference thereto, but leaves the complainant to make his proof. This defendant has no knowledge or information as to whether the said complainant, James J. Hill, furnished all the money paid by the said A. B. Stickney, but denies that the said James J. Hill was the only person interested or concerned with the said Stickney therein, and avers upon information and

belief that one Angus and one Stephens were interested with the said Hill in the transaction of said Stickney.

191 And this defendant denies all other matters and things stated in said bill of complaint necessary or material to be answered and which have not been hereinbefore answered.

And now, having fully answered the said bill of complaint, this defendant prays to be hence dismissed with his costs in this behalf sustained.

WILLIAM C. GOUDY.

JNO. N. JEWETT,
Of Counsel for said Def't.

Endorsed: Filed Oct. 1, 1883. Wm. H. Bradley, clerk.

192 Afterwards, to wit, on the twenty-sixth day of December, in the December term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On motion of counsel for the complainant, and by consent of parties, it is ordered by the court that the bill in this cause be amended according to the amendment this day filed herein, and that Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, George Smith, and Selah Chamberlain be made parties defendant in this cause.

On the same day, to wit, on the twenty-sixth day of December, 1883, came the complainant, by his solicitors, and filed in said clerk's office his amended bill in said entitled cause; which said amended bill is in the words and figures following, to wit:

Amended Bill.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

193 In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

(Removed from circuit court of Cook county, Illinois.)

By leave of the court first had and obtained the bill in this cause

is amended as follows, to wit: After the names and residences of the defendants on first page of said bill insert "Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, and E. L. Frank, of the State of New York; William Rockefeller and Selah Chamberlain, of the State of Ohio, and George Smith, of London, England."

After the names of the defendants Easton, Wadsworth, Walker, Hubbard, Johnson, and Merrill, wherever they occur in said bill and the prayers thereof (except in the allegations of the election of said defendants as directors of the Chicago and Evanston Railroad Company and their action as such directors), insert the names "Julius Wadsworth, Dickey, Milbank, Stillman, Woodward, Frank, Rockefeller, Chamberlain, and Smith."

ELA & PARKER,
Sol'rs for Comp't, Jas. J. Hill.

STATE OF MINNESOTA, }
County of Ramsey, } *ss:*

194 JAMES J. HILL, being duly sworn, on oath states that he is the complainant in said cause; that he has read the foregoing amendments and knows the contents thereof, and that the same and the matters therein contained are true, and that the bill of complaint in said cause as amended by said amendments is true except as to matters stated in said bill to be upon information and belief, and as to those matters he believes it to be true.

JAS. J. HILL.

Subscribed & sworn to before me this 21st day of December, 1883.

WM. ELY BRAMHALL,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

Endorsed: Filed Dec. 26, 1883. Wm. H. Bradley, clerk.

195 Afterwards, to wit, on the fourth day of January, 1884, in the December term of said court, 1883, in the record of the proceedings thereof in said entitled cause, before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On reading the affidavit of Frank R. Grover this day filed in this cause, it appearing to the court that the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, are not nor is any one of them inhabitants or residents of said northern district of Illinois, and cannot be found within said district, and have not, voluntarily or otherwise, appeared in this

cause, it is ordered that said defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, appear, plead, answer, or demur to the bill of complaint of the complainant herein on or before the first Monday of March, A. D. 1884; and it is ordered that a copy of this order be served on the said defendants.

196 Afterwards, to wit, on the third day of March, 1884, there was filed in said clerk's office a certified copy of the order of January fourth, 1884, in said entitled cause; which said certified copy, together with the return endorsed thereon, is in the words and figures following, to wit:

197 United States Circuit Court, Northern District of Illinois.

FRIDAY, *January 4th, A. D.* 1884.

Present: Hon. Thomas Drummond, circuit judge.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On reading the affidavit of Frank R. Grover this day filed in this cause, it appearing to the court that the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, are not nor is any one of them inhabitants or residents of said northern district of Illinois, and cannot be found within said district, and have not, voluntarily or otherwise, appeared in this cause, it is ordered that said defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, appear, plead, answer, or demur to the bill of complaint of the complainant herein on or before the first Monday of March, A. D. 1884; and it is ordered that a copy of this order be served on the said defendants.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 4th day of January, A. D. 1884, in the cause wherein James J. Hill is the complainant and The Chicago and Evanston Railroad Company *et al.* are the de-
198 fendants, as the same appears from the original records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 10th day of January, A. D. 1884.

[SEAL.] WM. H. BRADLEY, *Clerk.*

STATE OF NEW YORK, }
County of New York, } ss:

CHARLES F. WINCH, being of mature age and being duly sworn, on oath says that at the city of New York, in the county and State of New York, he served the within order on the persons hereinafter respectively named and in said order mentioned by delivering a copy of said order to each of said persons personally as follows, to wit:

To Julius Wadsworth, on the 25 day of January, 1884;
To Hugh T. Dickey, on the 25 day of January, 1884;
To J. Milbank, on the 25 day of January, 1884;
To James Stillman, on the 25 day of January, 1884;
To James T. Woodward, on the 25 day of January, 1884;
To E. L. Frank, on the 25 day of January, 1884,
And to William Rockefeller, on the 25 day of January, 1884.

CHAS. F. WINCH.

Sworn to before me this 26th day of January, 1884.
Witness my hand and official seal.
[SEAL]

HENRY C. BANKS,
Notary Public, 3 John St., N. Y. City.

Endorsed: Filed Mar. 3, 1884. Wm. H. Bradley, clerk.

199 On the same day, to wit, on the third day of March, 1884, there was filed in said clerk's office a certified copy of the order of January fourth, 1884, in said entitled cause; which said certified copy, together with the return endorsed thereon, is in the words and figures following, to wit:

200 United States Circuit Court, Northern District of Illinois.

FRIDAY, *January 4th, A. D.* 1884.

Present: Hon. Thomas Drummond, circuit judge.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On reading the affidavit of Frank R. Grover this day filed in this cause, it appearing to the court that the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, are not nor is any one of them inhabitants or residents of said northern district of Illinois, and cannot be found within said district, and have not, voluntarily or otherwise, appeared in this cause, it is ordered that said defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, appear, plead, answer, or demur to the bill of complaint of the com-

plainant herein on or before the first Monday of March, A. D. 1884; and it is ordered that a copy of this order be served on the said defendants.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 4th day of January, A. D. 1884, in the cause wherein James J. Hill is the complainant and
201 The Chicago and Evanston Railroad Company *et al.* are the defendants, as the same appears from the original records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 23d day of January, A. D. 1884.

[SEAL.] WM. H. BRADLEY, *Clerk.*

In the Circuit Court of the United States for the Northern District of Illinois.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

JAMES J. HILL *vs.* THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

STATE OF OHIO, *County of Cuyahoga,* } *ss:*

H. CLARK FORD, being of mature age and being duly sworn, on oath says that, acting upon behalf of the complainant in the above-entitled cause, on the 24th day of January, 1884, at the city of Cleveland, in the county of Cuyahoga, in the State of Ohio, he served the within order on the within-named Selah Chamberlain, he being one of the defendants in above-entitled cause, by delivering to and leaving with him a true copy of said order.

H. CLARK FORD.

202 Sworn to before me and subscribed in my presence by said H. Clark Ford this 24th day of January, 1884.

[SEAL.] WALTER A. BIDDLE,
Notary Public in and for said County and State.

Endorsed: Filed Mar. 3, 1884. Wm. H. Bradley, clerk.

On the same day, to wit, on the third day of March, 1884, there was filed in said clerk's office a certified copy of the order of January fourth, 1884, in said entitled cause; which said certified copy, together with the return endorsed thereon, is in the words and figures following, to wit:

203 United States Circuit Court, Northern District of Illinois.

FRIDAY, *January 4th, A. D.* 1884.

Present: Hon. Thomas Drummond, circuit judge.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On reading the affidavit of Frank R. Grover this day filed in this cause, it appearing to the court that the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, are not nor is any of them inhabitants or residents of said northern district of Illinois, and cannot be found within said district, and have not, voluntarily or otherwise, appeared in this cause, it is ordered that said defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, appear, plead, answer, or demur to the bill of complaint of the complainant herein on or before the first Monday of March, A. D. 1884; and it is ordered that a copy of this order be served on the said defendants.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court on the 4th day of January, A. D. 1884, in the cause wherein James J. Hill is the complainant and
204 The Chicago and Evanston Railroad Company *et al.* are the defendants, as the same appears from the original records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this 10th day of January, A. D. 1884.

[SEAL.] WM. H. BRADLEY, *Clerk.*

I JOHN TODD CAMPION, of 46 Common street, in the city of London, England, articled clerk to Messieurs Mossop and Rolfe, of the same place, solicitors, being of mature age and being duly sworn, on oath says that on the fourth day of February, A. D. 1884, at the Reform Club, Pall Mall, in the county of Middlesex, England, he served the within order on the within-named George Smith, one of the defendants named in said order, by delivering a copy of said order to said George Smith personally on the said day above mentioned.

JOHN TODD CAMPION.

Subscribed and sworn to at the consulate general of the United States of America, at London, England, before me this 6th day of February, 1884.

[SEAL.] L. H. MITCHELL,
Vice and Deputy Consul General U. S. A., London.

Endorsed: Filed Mar. 3, 1884. Wm. H. Bradley, clerk.

205 Afterwards, to wit, on the twenty-first day of May, 1884, came Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, and others, by their solicitor, and filed in said clerk's office their answer to the amended bill in said entitled cause; which said answer is in the words and figures following, to wit:

206 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

The joint and several answer of Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah R. Chamberlain, defendants, &c., to the amended bill of complaint of the above-named complainant.

For answer to said bill the said Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah R. Chamberlain admit that they are stockholders of the defendant, The Chicago and Evanston Railroad Company, but say that they know little or nothing respecting the dealings or transactions stated in the said bill of complaint, and to save expense and prolixity said defendants crave leave to refer to and adopt the joint and several answer of their co-defendants, Easton, Walker, Wadsworth, and Hubbard, heretofore filed in said cause, as the joint and several answer of these defendants; but, if said plaintiff so desires, these said defendants are ready and willing to put in a full answer to said amended bill of complaint.

JULIUS WADSWORTH,
J. MILBANK,
JAMES WOODWARD,
GEORGE SMITH,
SELAH R. CHAMBERLAIN,
HUGH T. DICKEY,
JAMES STILLMAN,
E. L. FRANK,
WILLIAM ROCKEFELLER,
By E. WALKER,
Their Solicitor.

Endorsed: Filed May 21, 1884. Wm. H. Bradley, clerk.

207 Afterwards, to wit, on the twenty-first day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his exceptions to the answer of Julius Wadsworth, Hugh T. Dickey, *et al.* in said entitled cause; which said exceptions are in the words and figures following, to wit:

208 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Exceptions taken by the complainant to the insufficient joint and several answer of the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah Chamberlain.

First. For that the said defendants have not, to the best and utmost of their knowledge, remembrance, information, and belief or otherwise, answered and set forth the amount or number of shares of the stock of the defendant, The Chicago and Evanston Railroad Company, that is now held or owned by each of said defendants respectively or that was held or owned by them respectively at the time of the filing of their joint and several answer herein.

Second. For that the said defendants have not, to the best and utmost of their knowledge, remembrance, information, and belief or otherwise, answered the allegations of the complainant's amended bill of complaint herein, either specifically or otherwise.

Endorsed: Filed June 21, 1884. Wm. H. Bradley, clerk.

209 Afterwards, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the disclaimer of the Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill, and John Johnston in said entitled cause; which said replication is in the words and figures following, to wit:

210 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for said District.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the joint and several disclaimer of the Chicago, Milwaukee, and St. Paul Railway Company, S. S. Merrill, and John Johnston.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiences of the said disclaimer of the said defendants, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said disclaimer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said disclaimer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28th, A. D. 1884. Wm. H. Bradley, clerk.

211 On the same day, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of Wm. C. Goudy in said entitled cause; which said replication is in the words and figures following, to wit:

212 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for said District.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the separate answer of William Goudy.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

213 On the same day, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of George Chandler in said entitled cause; which said replication is in the words and figures following, to wit:

214 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for said District.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the separate answer of George Chandler.

This repliant, saving and reserving to himself now and at all

times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

215 On the same day, to wit, on the twenty-eighth day of May, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of the North Chicago City Railway Company in said entitled cause; which said replication is in the words and figures following, to wit:

216 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for said District.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the separate answer of the North Chicago City Railway Company.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is

ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

217 On the same day, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of V. C. Turner, Ebenezer Buckingham, and Samuel B. Chase in said entitled cause; which said replication is in the words and figures following, to wit:

218 UNITED STATES OF AMERICA, *Northern District of Illinois*, } ss:

In the Circuit Court of the United States for said District.

JEMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the joint and separate answer of Volentine C. Turner (sued by the name of Volney C. Turner), Ebenezer Buckingham, and Samuel B. Chase.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

219 On the same day, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in

said clerk's office his replication to the answer of The Chicago and Evanston Railroad Company in said entitled cause; which said replication is in the words and figures following, to wit:

220 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the separate answer of The Chicago and Evanston Railroad Company.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

221 On the same day, to wit, on the twenty-eighth day of June, 1884, came the complainant, by his solicitors, and filed in said clerk's office his replication to the answer of John De Koven in said entitled cause; which said replication is in the words and figures following, to wit:

222 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for said District.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The replication of James J. Hill, complainant, to the separate answer of John De Koven.

This repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer of the said defendant, for replication thereunto says that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

GORDON E. COLE.

ELA & PARKER AND
STILES & LEWIS,
Solicitors for Complainant.

Endorsed: Filed June 28, 1884. Wm. H. Bradley, clerk.

223 Afterwards, to wit, on the twenty-eighth day of July, in the July term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now, on this day, come the parties, by their respective solicitors, and it is stipulated as follows, to wit: That the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah R. Chamberlain, shall not dispose of their stock in the Chicago and Evanston Railroad Company mentioned in the answer of

the said defendants and of their codefendants, Easton and others, herein until after the first Monday of October next.

And it is ordered by the court that this cause be referred to Henry W. Bishop, master in chancery, to hear the exceptions to the answers herein and to take and report the testimony, and that there be no hearing before the master before the first day of October next.

224 Afterwards, to wit, on the sixth day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

And now, on this day, come the parties, by their respective solicitors, and upon motion of solicitor for the complainant it is ordered by the court that the defendants, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah Chamberlain, shall not dispose of their stock in the Chicago and Evanston Railroad Company mentioned in the answers of the said defendants and of their codefendants, Easton and others, herein until the further order of this court; and it is further ordered that the proofs for complainant be closed by the fifteenth day of November, 1884.

225 Afterwards, to wit, on the fourteenth day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now come the parties, by their solicitors, and by consent it is ordered that the exceptions filed herein to the answers of Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah R. Chamberlain be, and the same are hereby, overruled; and, on motion of Mr. Ela, William A. Spencer, of St. Paul, Minnesota, is hereby appointed special examiner herein under the amended sixty-seventh rule, in equity, of this court to take the testimony of A. B. Stickney and James J. Hill.

226 Afterwards, to wit, on the twenty-seventh day of October, in the adjourned October term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

On motion of complainant and by agreement of the parties it is ordered by the court that the bill in said cause be, and the same is hereby, amended by and according to the amendments this day filed in said cause, and that no further answers be required.

On the same day, to wit, on the twenty-seventh day of October, 1884, came the complainant, by his solicitors, and filed in said clerk's office his amended bill in said entitled cause; which said amended bill is in the words and figures following, to wit:

227 In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Amendments to Bill.

By agreement of parties and by leave of the court first had and obtained the bill in this cause is amended as follows, to wit:

After the words "Stickney therein," in the twenty-eighth line of the thirty-first page of said bill (being original bill filed in circuit court of Cook county), and in 20th line of 47th page of copy of record of said cause filed in this court, insert as follows:

"Your orator further shows that it is pretended and claimed by defendants that the said 875 shares of stock and said note was sold and transferred by the defendant, The North Chicago City Railway Company, to the defendant Easton, as trustee for himself and for the defendants, Julius Wadsworth, Dickey, Milbank, Stillman, Woodward, Frank, Rockefeller, Chamberlain, and Smith, and that a certificate for said stock and said note were delivered to said defendant Easton, and that he surrendered said certificate and took a new certificate from said Chicago and Evanston Railroad Company in place thereof for said 875 shares of said stock issued to him as a trustee,
and on the same day surrendered said last-named certificate;
228 and thereupon certificates for said amount of shares for full-paid stock were in place thereof issued to said defendants, for whom it was claimed that said Easton acted as trustee as afore-

said—that is to say, to said defendants Smith, Julius Wadsworth, Dickey, Milbank, Chamberlain, Rockefeller, Stillman, Woodward, and Frank—each for 70 shares, and to defendant Easton for 50 shares, and to defendant Easton, as trustee, another certificate for 195 shares, and that defendant Easton afterwards transferred to said defendants Dickey and Milbank each 50 shares so held by him as trustee, and that certificates for full-paid stock were issued to said Dickey and Milbank for same, and that the defendants also pretend and claim that the defendants Easton, Walker, T. W. Wadsworth, and Hubbard also surrendered certificates for such stock held by them, and that new certificates in place thereof for full-paid stock were issued to them, each for one share.

And your orator further shows that it is pretended and claimed by defendants that the capital stock of said Chicago and Evanston Railroad Company has since been increased from one hundred thousand dollars by the vote of the said pretended stockholders of said company (being said defendants so holding said certificates as aforesaid) to the amount of one million dollars, and that shares of stock of said company have been sold by said company since said increase to the amount of four hundred and fifty-four thousand and three hundred dollars, and that said shares of stock have been purchased and are held by said defendants as follows, to wit: Julius
229 Wadsworth to the amount of 562 shares; J. Milbank, 560 shares; said defendants Dickey, Smith, Stillman, Chamberlain, Rockefeller, Woodward, and Frank, each 420 shares; said defendant Easton, 253 shares; said Easton, trustee, 125 shares, and said defendants Walker, T. W. Wadsworth, and Hubbard, each one (1) share, and that said company is continuing to sell such stock (said new or increased stock).

And your orator further shows upon information and belief and charges the fact to be that the said pretended transfers of said stock and of the certificates thereof, and the said surrender of certificates and the said taking of others in place thereof and any payments therefor, and said pretended increase of capital stock and all such sales and transfers thereof and all said acts in regard thereto were made or done without any power or authority and are void, and were with full knowledge on the part of all the said defendants who received said stock or certificates or who did said acts of the contracts mentioned in this your orator's bill of complaint and of the rights and claims of your orator set forth herein and of his interest in and right to said stock and property as set forth herein, and that said defendants who voted or caused said increase of said capital stock were not stockholders of said company and had no right to vote or cause such increase."

After the words "and by-laws of said company," in the 9th and 10th lines of thirty-third page of said bill (being original bill filed in the circuit court of Cook county) and in 22d and 23d lines of 49th page of copy of record of said cause filed in this court and
230 being in the prayer of said bill, insert the words "and that said increase of said capital stock be set aside by the court and be decreed to be null and void, and that the said new or in-

creased stock and all certificates therefer be decreed to be surrendered and canceled and held for nought, or that the said new or increased stock and the certificates therefor be delivered to your orator or new certificates therefor be decreed to be issued to your orator."

After the words "disposing of said," in the 14th line of 33d page of said bill (being original bill filed in the circuit court of Cook county, and in 28th and 29th lines of 49 page of copy of record of said cause filed in this court, and being also in the prayer of said bill), insert the words "eight hundred and seventy-five shares of stock (or any stock issued in place thereof), or said 110⅜ shares of stock, or said pretended new or increased," and after the words "and enjoining said defendants" (being also in the prayer of said bill), in the 33d line of 33d page of said bill, insert the words "and that your orator may have such other and further relief as the nature of the case or as equity may require and to your honors shall seem meet" (said words to be inserted in said line and page of said original bill and in 26th and 27th lines and 50th page of the copy of record of said cause filed in this court.)

231 STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

JAMES J. HILL, being first duly sworn according to law, on oath says that he is the complainant in said cause; that he has read the foregoing amendments and knows the contents thereof, and that the same and the matters therein contained are true, and that the bill of complaint in said cause as amended by said amendments is true except as to matters stated in said bill to be upon information and belief, and as to those matters he believes it to be true.

JAS. J. HILL.

Subscribed and sworn to before me this 25th day of October, 1884.

WM. ELY BRAINHALL,
[SEAL.] *Notary Public, Ramsey Co., Minne.*

It is agreed that the foregoing amendment may be made and that the allegations therein contained shall be considered as denied and in issue without further answer or replication.

E. WALKER, *Sol.*
W. C. GOUDY, *Per se.*

Endorsed: Filed Oct. 27, 1884. Wm. H. Bradley, clerk.

232 Afterwards, to wit, on the twelfth day of January, 1885, in the December term of said court, 1884, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

It is ordered that this cause be set for hearing on the second day of February next.

233 Afterwards, to wit, on the twentieth day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now come the parties, by their solicitors, and the defendants, by Mr. Walker, their solicitor, move the court for leave to file amendments to their answers, and the same, being objected to by counsel for complainant, is held by the court for further consideration; and this cause, being set for hearing this day upon pleadings and proofs, now comes on to be heard, and, after hearing arguments of counsel in part, it is ordered by the court that further hearing herein be be postponed until to-morrow morning.

234 Afterwards, to wit, on the twenty-first day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now again come the parties, by their solicitors, and this cause again comes on to be heard upon the pleadings and proofs, and, after hearing further arguments of counsel, it is ordered that further hearing herein be postponed until to-morrow morning.

235 Afterwards, to wit, on the twenty-second day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Har-

lan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now again come the parties, by their solicitors, and this cause again comes on to be heard upon the pleadings and proofs, and, after hearing additional arguments of counsel, it is ordered that further hearing herein be postponed until to-morrow morning.

236 Afterwards, to wit, on the twenty-third day of May, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the Justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now again come the parties, by their solicitors, and the court, having considered the motion of the defendants for leave to *to* file amended answers herein, sustains said motion and allows the same to be filed as of the twentieth instant, the general replication heretofore filed herein to apply to said amendments, and leave is given to amend the original bill and petition for removal herein as per stipulations filed on the twenty-first instant, and it is ordered that the same be made a part of the record herein.

And this cause again comes on to be heard upon the pleadings and proofs, and, after hearing the concluding arguments of counsel, the court takes the same under advisement.

237 On the same day, to wit, on the twenty-third day of May, 1885, came Jason C. Easton, Edwin Walker, Tertius W. Wadsworth, Elijah K. Hubbard, *et al.*, by their solicitor, and filed in said clerk's office their amended answer in said entitled cause; which said amended answer is in the words and figures following, to wit:

238 In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

The defendants, Jason C. Easton, Edwin Walker, Tertius W.

Wadsworth, Elijah K. Hubbard, *et al.* by leave of court amend that paragraph on page — of the joint and several answer of said defendants commencing with the words "and these defendants, further answering the bill of complaint," so as to read as follows, to wit:

And these defendants, further answering, expressly deny that they or either of them, at the date of or prior to the making of said contract between the said Goudy and Easton and Cary bearing date the 8th day of August, A. D. 1882, had any knowledge, information, or notice of the said contract between the said Goudy and A. B. Stickney and Company of the 28th day of May, A. D. 1880, nor had these defendants or either of them any knowledge, information, or notice, prior to the filing of complainant's bill in said cause, of any claim or pretended claim, equitable or legal, of the said A. B. Stickney and Company or of the complainant herein to the certificates for stock referred to in said bill of complaint under said contract of the 28th day of May, but, on the contrary, the defendants charge the fact to be that said purchase of Easton and Cary was *bona fide*,
239 without notice, and for a valuable consideration.

JASON C. EASTON,
EDWIN WALKER,
TERTIUS W. WADSWORTH,
ELIJAH K. HUBBARD,
By E. WALKER, *Solicitor.*

Endorsed: Filed May 23d, 1885. Wm. H. Bradley, clerk.

On the same day, to wit, on the twenty-third day of May, 1885, came the Chicago and Evanston Railroad Company, by its solicitor, and filed in said clerk's office its amended answer in said entitled cause; which said amended answer is in the words and figures following, to wit:

240 In the United States Circuit Court, Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

The defendant, Chicago and Evanston Railroad Company, by leave of court amend that paragraph on page — of the answer of said defendant commencing with the words "and this defendant admits that by its proper officers" so as to read as follows, to wit:

And this defendant admits that by its proper officers it issued to John De Koven, trustee, on the 28th day of May, 1880, a certificate of the character hereinbefore mentioned, upon the surrender of other certificates, for an equal number of shares for eight hundred and seventy-five shares of the capital stock of this defendant, and says that said certificate was subsequently, on the — day of June, 1882, assigned to V. C. Turner, and upon the 16th of June, 1882, said certificate was surrendered by said Turner and a new certificate instead

thereof issued to him, which said certificate was surrendered by the said Turner on the 19th day of August, 1882, and instead thereof a new certificate for the same amount was issued to J. C. Easton.

CHICAGO AND EVANSTON RAILROAD COMPANY,
By E. WALKER, *Solicitor.*

Endorsed: Filed May 23d, 1885. Wm. H. Bradley, clerk.

241 Afterwards, to wit, on the twenty-ninth day of May, 1885, came Ela and Parker and filed in said clerk's office their withdrawal of appearance as solicitors in said entitled cause; which said withdrawal of appearance is in the words and figures following, to wit:

242 In the United States Circuit Court for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

We hereby withdraw our appearance as solicitors for the complainant in above-entitled cause.

ELA & PARKER.

Endorsed: Filed May 29, 1885. Wm. H. Bradley, clerk.

243 Afterwards, to wit, on the eighth day of June, 1885, there was filed in said clerk's office the opinion of Justice Harlan in said entitled cause; which said opinion is in the words and figures following, to wit:

244 United States Circuit Court, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILWAY CO. *et al.*

MONDAY, *June 8th*, 1885.

Decision.

HARLAN, *J.:*

It is hardly necessary in this case, I suppose, to make any very full statement of the facts, for they are, of course, in the mind of counsel, the case was so recently argued. Briefly stated, the main object of this suit is to obtain a decree compelling the transfer and assignment to James J. Hill of certain shares of stock in the Chicago & Evanston Railroad Company. To that suit there are various defendants—William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, D. K. Hibbard, Samuel B. Chase, Ebenezer Buckingham, and John B. Johnston, of

this State; J. C. Easton, The Chicago, Milwaukee & St. Paul Railroad Co., The North Chicago Railway Company, The Chicago and Evanston Railway Company.

245 I am of opinion that this suit must be dismissed as to the defendants De Koven, Turner, Chandler, Goudy, North Chicago City Railway Co., and The Chicago, Milwaukee & St. Paul Railway Co. for want of equity with costs to each of those defendants. The grounds upon which that conclusion rests are these:

Mr. Goudy obtained a contract with the Chicago & Evanston Railway Co. under which it became his duty to secure certain rights of way to the end that this railroad might be completed from a certain point in this city to Calvary cemetery, beyond the limits of the city, in the town of Evanston. He was to receive $25,000.00 when he performed his part of this contract.

On the same day a contract was entered into between A. B. Stickney & Co. and the Chicago & Evanston Railway Co. by which Stickney & Co. undertook the construction of that railway and were to receive certain compensation from the company. On the same day Mr. Goudy made a contract with Stickney & Co., which contract is the one principally involved in this litigation and by which the rights of the parties are to be determined. By that contract Goudy undertook that he would perform all the covenants and agreements contained in his contract with the Chicago & Evanston Railroad Company. He also agreed that he would cause to be properly assigned to De Koven, as trustee, 875 shares of the capital stock of the Chicago & Evanston Railway Co., to be held by De Koven in trust for purposes not necessary at present to be stated, and also cause to be properly assigned to De Koven, as trustee, a certain note made by the Chicago & Evanston Railway Co. to the North Chicago

246 City Railway Co. Observe, his agreement is to cause these assignments to be made. That arose from the fact alleged in the bill and abundantly shown by the testimony, that those certificates of stock and that that note were at the time of this agreement the property of the North Chicago City Railway Co.

Mr. Goudy undertook by that agreement to render certain professional services, which, as appears from the face of the contract, were to be directed to the end of securing the right of way for the construction of this road. Mr. Goudy had become and had been for some while the owner of certain unimportant real estate in the neighborhood of Evanston and was concerned in these contracts with the road from the desire to have this road constructed so as to benefit his property.

In consideration of the premises Stickney & Co. agreed as follows: That they would pay the sum of $55,000.00 in installments, $20,000.00 on the signing of this agreement to be paid to Mr. Goudy; in ten days after Goudy shall have performed and completed all his agreements with the railroad Co. they were to pay $15,000.00 more, and sixty days after that payment the final payment of $20,000.00 was to be made; so that the first, the installment of $15,000.00, did not become due and payable until Goudy had performed his contract

with the railroad Co. by securing these rights of way so that the road could be constructed.

247 Now, it is provided in the contract that De Koven should hold these shares of stock and this note in trust until either the party of the first part, which is Goudy, or the second part, Stickney & Co., shall be entitled to the delivery and possession of the same according to the terms of this contract.

The $15,000.00 and the $20,000.00, when paid, were to be paid to De Koven in trust for Goudy.

Now, if Stickney & Co. failed or neglected to make the payment of these two installments as prescribed in the contract, then the contract was ended, if Goudy so elected, and all the money and all the rights under that contract were to be forfeited and might be kept by Goudy as liquidated damages, and De Koven was to assign and transfer the shares of stock held by him to Goudy, together with any money in his hands, including Goudy's claim for compensation under his contract with the railway Co.

It was further agreed that if Goudy made default in the performance of his agreement so that Stickney & Co. were not required to make the payment of $15,000 and $20,000 and such default shall continue for three months after the first of March, 1881, then Stickney & Co. were at liberty under the contract to pay $25,000 over to De Koven, as trustee, in lieu of the $15,000 and $20,000 payments; and thereupon it became the duty of De Koven to assign to them the stock and the note, and they were entitled in that contingency to recover from Goudy such damages as they sustained by rea-

248 son of such default, not exceeding $35,000; but in case—and this is a material part of this case—"but in case said second party shall neglect to pay said $25,000 within four months after the first day of March, 1881, then De Koven shall transfer said stock and deliver said note and assignment in his hands to the first party or his assigns." The materiality of that language is strengthened by a reference to the contract made the same day between Goudy and the North Chicago City Railway Co., by which the stock was placed in the hands—not only placed in the hands of Goudy, and he was authorized to deposit it with De Koven in accordance with his contract with Stickney & Co., but under the distinct agreement that if that $25,000 was not paid to the hands of De Koven for the North Chicago City Railway Co. on or before the first day of July, 1881, then De Koven, upon the production of the contract between Goudy and the North Chicago Railway Co., should hand that stock and note back to the North Chicago Railway Co.

So the case in brief, then, is this: Goudy undertook to secure the right of way, and he had until a certain period in 1881 to do it. If he did not procure that right of way by the first day of June, 1881, then Stickney & Co. could step forward and pay $25,000 and obtain the stock and note; but if they did not pay $25,000 by the first day of June, 1881, then the stock and the note were to be handed to Goudy or his assigns, and in this case his assigns would be the North Chicago Railway Co., because by his contract with that com-

249 pany the production of that contract was the order to deliver the stock back to them.

So Goudy failed to perform his part of the contract by the time allotted; therefore the payment of $15,000 and $20,000 from Stickney & Co. did not become — and payable, and Stickney & Co. failed to perform that act which, by the terms of the contract, was essential to entitle them to this stock and this note. It is alleged in the bill, and it is undoubtedly true from all the proofs, that these three contracts, executed on the same day, and as to three of them reference being made in each to all the balance, was one transaction, and that each paper is to be construed in the light of the other.

Now, if on the second day of July, 1881, De Koven, the trustee, had refused to surrender this note and this stock to anybody—had determined to hold on to it until he was advised by the law what to do; if on that day the North Chicago Railway Co. had instituted its suit in equity and made Goudy a party, De Koven a party, Stickney & Co. a party, the Chicago & Evanston Railway Co. a party, and these contracts were produced and laid before the court—there can be no doubt at all in my mind that by virtue of these contracts the North Chicago Railway Co., whom the bill alleges and whom the evidence shows to be was the equitable owner of this stock and this note, would have been entitled to a decree requiring De Koven to convey this stock and this note over to it. Did it do any-
250 thing after that day to forfeit its right in that regard? There is nothing in the evidence to show. Could Goudy do anything after that to deprive the North Chicago Railway Co. of the right to this stock and note? The only thing which it is alleged that he did in that direction was, after the expiration of the time limited for Stickney & Co. to become the owners of this stock and this note, that he applied to Stickney & Co. for an extension of time in which to procure the right of way, and that they assented to it, and that by mutual agreement between Goudy and Stickney & Co. the contract was thus extended.

If there were no other interests in the case involved than those of Goudy and Stickney & Co. there would be very great force in that objection; and undoubtedly after the first of July, 1881, Goudy was willing that the contract might be considered as standing between him and Stickney & Co. That was the feeling of both of them, and so continued, perhaps, until a late period. Perhaps, when Mr. Goudy became satisfied that Stickney & Co. were not going to do this work within proper time, and then informed them that he had no further control over the matter, and under the contract the stock and the note belonging to the North Chicago Railway Co., their contract was at an end, and nothing further could be done without a new arrangement. Putting the evidence in the strongest light in that particular for Stickney & Co., and assuming that Mr. Goudy asked for an extension of time, and that Stickney & Co. agreed to it, yet that
251 does not affect the right of the North Chicago Railway Co. to the stock on and after the first of July, 1881, and that company, being informed of Mr. Goudy's purpose to obtain it from De Koven, gives notice to De Koven that it was their property, exhibited the contract under which they were entitled to receive it,

and they did receive it, and the contract as between Stickney & Co. and Goudy therefore came to an end.

It is argued in the case, however, that the subsequent proceeding to which Goudy was a party and the North Chicago Railway Co. was a party and others were parties tends to show that was a mere pretence, this assertion of right on the part of the North Chicago Railway Co. It is quite true that after the original arrangement had thus been destroyed by the failure of Stickney & Co. to pay the $25,000—that after that was done and after the stock and note had gone into the hands of the Chicago & Evanston road—Goudy made a subsequent arrangement with the North Chicago Railway Co, by which he again acquired control of the stock, and made a contract with Easton and Carey for the transfer to them. Undoubtedly the circumstances are such as to impose upon the court the duty to look narrowly into all of them, and, so far as they are involved in that suggestion, I have endeavored to do so, and I see nothing that affects at all the right in law and equity for the North Chicago Railway Co., having recovered the stock and note, which they had the right to do under the contract, to make any arrangement that they might choose to make with Mr. Goudy in reference to it, and that therefore in this suit and under these circumstances
252 there is no ground to question the validity of the contract between Goudy and Carey and Easton on the subsequent transfer of the stock.

The suit therefore must fail as to these parties unless it be, as is claimed, that there is ground for a money decree against Goudy with others in the suit. The only ground of a money decree that I can discover in this suit as against Goudy will arise out of his failure to procure the right of way within the time limited, for the contract provides that if he is in default as late as the first of June, 1881, that De Koven might pay the $25,000 and recover from Goudy such damages as he has sustained by reason of such default. Without meaning to intimate any opinion upon the question whether any such damages may or may not be recovered in some other form of action, I am entirely clear that no such claim is at all germain to this suit. The object of this suit is simply to compel the transfer and assignment of this stock to Stickney & Co. To that issue Goudy is perhaps not a necessary party, because he was confessedly no longer the owner of that stock or had any interest in it, and the claim that Stickney & Co. may have, if they have any, for damages against Goudy for his failure to procure the right of way within the time limited is a cause of action for which there is a complete remedy at law, as to which there is no ground to come into a court of equity, and it is entirely foreign to the whole frame and scope of this suit. There is nothing in the case from beginning to end that indicates a purpose on the part of the pleader who framed the bill
253 in this case to seek a money decree against Goudy. The specific relief asked is the transfer and assignment of this stock, followed by a prayer for general relief. I understand the rule to be that the court cannot give relief under a general prayer which is inconsistent with a specific relief asked and which is not within

the frame and scope of the suit. I do not, therefore, see any ground for a money decree in this suit as between the plaintiff and Goudy, and the suit as to the parties that I have named must be dismissed. It must also be dismissed as to the Chicago, Milwaukee & St. Paul Railway Co. They disclaim having any ownership in this stock or this property, and there is nothing in the record that shows that they have any interest. The case must go as to them. I think the bill must also be dismissed so far as relates to the certificates of 110⅔ shares of stock issued to Stickney & Co. on the 30th of September, 1881; that order is made because I see no escape from the conclusion that those certificates or the right to those certificates was forfeited by the railway Co. in accordance with its by-laws.

But the suit as to the other defendants is retained and referred to a commissioner for the following purpose:

It is conceded in the case that the $20,000 which was paid to Mr. Goudy at the time of these negotiations was not simply paid as a part of the contract, but was paid to him to the end that he might use it to procure rights of way.

254 The calculation was to take all these agreements together. Stickney & Co. were to build this road and become the owners of the stock; that was the purpose of their engagement, and all the parties knew that from the face of these agreements, and that they might construct it, and thus become the owners of this stock and this note, $20,000 of this $55,000 was placed in the hands of Mr. Goudy for the purpose of preparing the way to the construction of the road by procuring rights of way along the line. Well, he did so to some extent. I infer from his testimony that the larger part of the $20,000 was expended in that way. I infer from the testimony that he was diligent in that direction, evidently miscalculated his power to obtain the right of way within the time limited by the contract, and he went as far as he could reasonably go perhaps with the time, but, be that as it may, a large part of this $20,000 was expended by him to procure right of way, not for himself, but for Stickney & Co. Now, that right of way thus purchased by the money of Stickney & Co. is in the possession of this railroad Co., and they have paid nothing for it to Stickney & Co. or their assignee Hill, and it does not accord with my sense of justice to say or to hold that the money of Stickney & Co. thus invested in this right of way should go to the benefit of this railroad Co. without their paying for it, and that is a matter between the complainant and the railroad Co.; that right of way which may have been involved in the contract between Goudy and Easton and Carey was not in any legal or equitable sense the property of Mr. Goudy. In the purchase of

255 it he was the representative of Stickney & Co., and there was enough in this case to put those who last contracted with Mr. Goudy upon the inquiry as to the extent of interest which Stickney & Co. had in that regard. If they had known all that did actually occur I do not think they would be affected by any consideration in the case other than that which arises out of the fact that they are in possession of and using a right of way purchased with money furnished by Stickney & Co. to Mr. Goudy for that purpose; but I

incline to the opinion that in this suit, which is to obtain the transfer of that stock to Stickney & Co. and for general relief, that it is within the scope and general purpose of this suit, as the court cannot give a decree to that effect, *is* to give them a money decree to the extent that under the proof it appears that the defendants are in possession of the right of way, which was paid for by their money. I think this case, therefore, must go to the commissioner to ascertain and report the amount paid by Mr. Goudy for right of way in execution of the contract between him and A. B. Stickney & Co. of May 28, 1881. On the coming in of that report such further decree will be rendered as may be equitable and proper; and I incline to think now that that decree probably would be a lien against the Chicago & Evanston railroad, but it is not necessary to determine that now.

As to all the defendants except the ones that I have named the case would be retained for the coming of that report.

Endorsed: Filed June 8, 1885. Wm. H. Bradley, clerk.

256 On the same day, to wit, on the eighth day of June, in the adjourned May term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL *vs.* THE CHICAGO AND EVANSTON RAILROAD COMPANY, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah J. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, and S. S. Merrill.	In Chancery.

This cause coming on for final hearing upon the pleadings, depositions, and documentary evidence produced before the court, and the cause having been argued by counsel, and the court being sufficiently advised in the premises, it is ordered and decreed that the complainant's bill be dismissed for want of equity as against the defendants, William C. Goudy, Volney C. Turner, George
257 Chandler, Samuel B. Chase, Ebenezer Buckingham, John De Koven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and The Chicago, Milwaukee and St. Paul Railway Company, with their costs, to be taxed by the clerk. It is further ordered and decreed that so much of the complainant's bill as relates to the certificate of one hundred and ten and two-thirds shares of the capital stock issued to A. B. Stickney & Company, dated September thirtieth, 1881, be dismissed for want of equity.

It is further ordered and decreed that all relief be denied to the complainant upon all matters and things in controversy herein except as to the amount of money paid by the defendant, William C. Goudy, for right of way in execution of the contract between him and A. B. Stickney & Company of May twenty-eighth, 1880, and for the purpose of ascertaining said amount of money it is ordered that this cause be retained as to the other defendants, and that it be, and is hereby, referred to Henry W. Bishop, one of the masters in chancery of this court, to take additional testimony as to such amount, and that he make report of the amount so paid, and that on the making of such report such further decree will be rendered as may be equitable.

It is further ordered that, for the better discovery of the matters aforesaid, the parties are to produce before the said master
258 upon oath all deeds or books, papers, and writings in their custody or power relating thereto, and are to be examined on oath as the said master shall direct.

And thereupon the complainant prays an appeal to the supreme court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law and with security to be approved by the court.

259 Afterwards, to wit, on the thirty-first day of January, 1887, came Henry W. Bishop, one of the masters in chancery of said court, and filed in said clerk's office his report in said entitled cause; which said report, together with the testimony and exhibits thereto attached, are in the words and figures following, to wit:

260 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

Master's Report.

To the honorable the judges of said court:

I, Henry W. Bishop, master in chancery, to whom, by an order of the court entered in the above-entitled cause, it was referred to take additional testimony as to the amount of money paid by William C. Goudy, one of the defendants herein, for right of way in execution of the contract, between him and A. B. Stickney, of May 28, A. D. 1880, respectfully report that, in pursuance of said order, I have been attended by the respective counsel of the parties and by William C. Goudy, J. C. Easton, and Edwin Walker, witnesses, whose testimony has been duly taken and is herewith reported.

From an examination of which testimony I find and report there has been paid by said defendant, William C. Goudy, for right of way in execution of the contract, between him and A. B. Stickney and Company, of May 28, A. D. 1880, the sum of six thousand five

hundred and thirteen dollars ($6,513.00). This amount is made up of sums paid to different individuals for rights of way—the
261 sum of one thousand dollars ($1,000) paid to George Chandler for services in connection therewith and for costs and expenses also in connection therewith—but does not include the personal services of said defendant, Goudy, as attorney or otherwise.

It appears from the testimony that, subsequent to the execution of a contract between William C. Goudy and Easton and Carey for the procurement also of right of way, there was paid to Mr. Goudy on behalf of J. C. Easton the sum of seven thousand dollars ($7,000), forty-five hundred dollars ($4,500) of which was to be applied upon the amount before advanced by William C. Goudy for rights of way procured by him and for which he had paid or become liable to pay from the Stickney money, and it is insisted upon the part of the Chicago and Evanston Railroad Company that the amount found to have been advanced upon the Stickney contract should be reduced to the extent of such payment and a finding made by me in conformity with such reduction, but I understand the reference to me is only for the purpose of ascertaining and reporting the amount paid by Mr. Goudy for right of way in execution of the contract, between him and A. B. Stickney & Company, of May 28, 1880, and I therefore find, as before stated, that amount to have been the sum of six thousand five hundred and thirteen dollars ($6,513).

All of which is respectfully submitted.

HENRY W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated January 29, 1887.

262 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO AND EVANSTON R. R. Co., Defendant. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Wednesday, the 21 day of April, A. D. 1886.

Present: Mr. Hodges (representing Stiles and Lewis), for complainant.

WILLIAM C. GOUDY, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. HODGES, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

A. William C. Goudy; occupation, lawyer; residence, Chicago.

Q. You are the same William C. Goudy who is defendant in this suit to take whose testimony this reference is made?

A. Yes, sir.

Q. How much of the $20,000 paid you by Mr. Stickney or by Mr.

Hill under the contract of May 28, 1880, has been expended by you for the right of way of the Chicago & Evanston railroad?

A. I am not able to answer how much of that identical money was spent; but I can give the amounts that were spent for right of way after the making of the contract and the receipt of the $20,000.

263 Q. Will you give those amounts?

A. The aggregate amount actually paid was $6,513. In addition to the amount actually paid I made some contracts for the payment of money for the right of way, but did not pay the money. These rights of way were obtained by the payment of money after the contract was made with Carey and Easton.

Q. Did you pay that money or are you liable to pay it; have you paid it?

A. No; I have not; it was paid by the persons now in the control of the Chicago & Evanston Railroad Company. There was a contract made with Mr. Sheldon, representing the Sheffield estate, Mrs. McCagg, the Ogden estate, and the Jones estate, amounting to $5,500, which was in existence in May and June, 1882, when I had the conversation with Mr. Stickney about the matter and made an offer of $7,500 to settle the matter with him, but that $5,500 was not paid, and after Easton and Carey had been in control of the corporation they made a new contract with Sheldon, representing those parties, and paid the money to him on such new contract.

Q. Will you give the amount and items of that $6,513 and what it was for?

A. I paid James Quirk $775.

Q. Have you the date of that?

A. No, sir; I paid to S. C. Gross $800; to A. H. Burley, trustee, $800; to John Logerman, $275; to Theorn Pardee, $1,573; to J. H. Hubbel, $100; to J. A. Adams, $200; to George Chandler, for services rendered about the procurement of the right of way, $1,000;

264 for court costs, publishing notices, and fees to persons employed about the procurement of the right of way, $1,020. These sums make up the aggregate sum of $6,513.

Q. The amounts, except those which you have specified, were for right of way itself, were they?

A. All these items I have given were for right of way direct, except $1,000 paid to Chandler and $1,020 for costs and fees.

Q. How much of the right of way did you procure under the contract with Stickney and before the sale to Easton and Carey?

A. I could not answer accurately from any memory I now have of it, and I have no memorandum to fix it definitely, but my best recollection is that more than one-half and possibly two-thirds was obtained, but the greater quantity of it was by gift; no payments were made.

Q. Some contracts which you made with property-owners were fulfilled; the money due on them was paid after the sale to Easton and Carey?

A. Yes, sir.

Q. Those payments were all made by Easton and Carey?

A. Yes, sir; except those I have already specified.

Q. Do you know the money was paid to property-owners by Easton and Carey?

A. I know in regard to some of them personally and some of them I do not.

Q. You said there was about $5,500 due to some of the heirs of the Ogden estate?

A. I said I made a contract with Mr. Sheldon, representing the persons I have named, and agreeing to pay for the right of way
265 through their property $5,500, but that money was not paid at the time of the transfer to Easton and Carey, and after that they made a new contract for the right of way and paid a large sum, so that the contract which I made was abandoned.

Q. You paid none of that sum, either directly or indirectly, yourself?

A. No; I did not.

Q. Did you not testify in this case in the circuit court on the hearing in answer to a question asking how much had been expended by you for right of way, "A. That is difficult for me to do here from memory. There was money paid to the Ogden estate and other persons represented by the office where the business was done. Some of it belonged to others of the Ogden family." Did you not so testify on the trial?

A. I have an impression that I did, but I have not now any distinct recollection of what I testified to then.

Q. If you did so testify upon the trial your testimony was incorrect? You now say that the money was not at that time paid, but subsequently paid by Easton and Carey?

A. What I now state, having refreshed my recollection, is the correct statement.

Q. How much of your own professional time as a lawyer did you expend in procuring this right of way?

A. I spent a great deal of time, but whether I spent it professionally as a lawyer I would not undertake to say. I think I did not. I do not understand the procurement of a right of way is a part of a lawyer's business. This I undertook to do under the contract I made.

266 Q. You did a large amount of legal work, did you not, in procuring this right of way?

A. I don't know whether it was legal work or not. I saw a great many owners of property. I conducted negotiations. I procured donations of the right of way and obtained deeds or contracts for it. I had negotiations where damages were fixed, and filed petitions for condemnation of right of way.

Q. And attendance in the condemnation suits?

A. Yes, sir.

Q. That is such work as railroads usually employ railroad lawyers to attend to, is it not?

A. So far as services in court are concerned I understand it is usually done by lawyers.

Q. Would not the negotiations in bringing about the right of way for a railroad company be work usually done by lawyers?

A. So far as my knowledge goes I think it is not. Agents are employed to do that work ordinarily.

Q. You are a pretty good judge of what legal services are. I want to fix the amount or value of the legal services which you rendered.

A. I won't undertake to testify as a witness what legal services are. I will state what I did.

Q. There were a large number of suits brought and petitions for condemnation in the county court?

A. There were quite a number.

Q. You were attorney in those cases?

A. Yes, sir.

Q. Something like twenty cases from August, 1881, to the time when the transfer to Carey was made, was there not?

A. I can't state exactly the number, but I should say twelve or fifteen; there may have been twenty. The record will dis-
267 close that fact.

Q. One was the Chicago and Evanston railroad against William A. Passavant. Do you remember that case?

A. Yes, sir.

Q. Do you know the value of the services you rendered in that case? There was a trial by the court, finding of judgment, and order for payment.

A. No; I do not. The trial was a matter of form. We had agreed on the amount of damages before.

Q. What was it worth to file the petition? It was continued a large number of times—eight or ten times.

A. To file a petition in such a case ought to be worth $100. As to the services rendered subsequent to that, I don't remember what they were enough to fix any value upon them.

Q. What is the value of your legal services per day?

A. I charged usually about $100 per day.

Q. What would cover the value of the services which you rendered in that case?

A. I can't now tell the extent of them.

Q. You filed the petition. You say that was $100?

A. Yes, sir.

Q. The case was either passed or continued a certain time before it reached a trial. What would it be worth to appear and arrange all these different orders?

A. If it was passed simply on the call of the docket it would not be worth anything; if there was some negotiation about continuance and appearance in court it would be worth probably $10 for each appearance.

Q. Does the $100 for filing the petition include the trial of the case?

268 A. No, sir.

Q. How much would it be worth to try the case and see judgments entered and paid?

A. According to my recollection about the negotiations which resulted in the arrangement it would be worth about $100.

Q. Do you remember the case of the Chicago and Evanston railroad against A. H. Burley, trustee, August 7, 1881?

A. Yes, sir.

Q. What was it worth to try such a petition as that?

A. $200.

Q. What was it worth in that case to see the issues made up?

A. No issues were made.

Q. Was there a cross-petition filed in that case which was dismissed as to certain parties?

A. There may have been. I don't remember that.

Q. What do you say it would be worth in that case?

A. I have no recollection of any services in court in that case except when the judgment was finally rendered.

Q. There was a jury trial and verdict and judgment on the verdict?

A. There was no defense made. Witnesses were called, which fixed the value on two or three parcels of property by a single witness, I think, and services touching that matter would be worth $100. As to Mr. Burley, who was the defendant, there was an agreement made with him and deed made. I believe no damages — fixed by the court as to him.

Q. What were your legal services worth in negotiating that settlement with Burley?

269 A. As near as I can recollect what was done, I should say $100.

Q. Were there any other legal services in this case which I have not asked you about?

A. There may have been, but I don't now remember it.

Q. Do you recollect the case of the Chicago and Evanston Railroad Company against Thomas Stagg and Arnold Tripp?

A. Yes, sir.

Q. How much was it worth to file the petition in that case?

A. $100. I don't recollect the date of that. I think it was September, 1881.

Q. September 1, 1881. That case was continued some eight times. Amendment to petition was filed December 19th. Suit was dismissed on motion of petitioner at petitioner's cost. How much was it worth to attend to that suit, all those continuances, and to the order of dismissal?

A. My recollection is it was postponed without any question being presented to the court. Probably $50 would be a reasonable price for what was done in that case in court.

Q. The case was dismissed. Was it settled?

A. After the contract was made with Easton and Carey they purchased the property; the company purchased the property.

Q. It was dismissed before that, was it not—dismissed December 19, 1882?

A. I think it was—no; it was not; it was not dismissed until after they purchased the property.

Q. Do you remember the case of the Chicago and Evanston railroad against Theorn Pardee?

A. Yes, sir.

Q. How much were your services worth to file that petition?

269½ A. $100.

Q. There was an answer and cross-petition filed in that case. The case was set for trial and afterwards passed, and then dismissed at petitioner's cost. How much would the services be worth in conducting that?

A. I have now no recollection if anything was done in court about the case. There was some negotiation with Pardee, which resulted in an agreement with him, and afterwards he made a deed, for which I paid the sum I have mentioned, $1,573. As — the value of the services rendered in the negotiation, a lawyer's price ought to have been $100 for it, but what an agent's to procure the right of way would be worth I don't know.

Q. Do you remember the case of the Chicago and Evanston railroad against William Reynolds and Byon Lathrop?

A. Yes; I think that was the next year, 1881, some time.

Q. How much was it worth to file the petition in that case?

A. $100.

Q. The case was passed once and continued about nine times; then the petition was dismissed at petitioner's cost. How much was it worth to attend to making those orders?

A. I think there was nothing done in court about the continuance.

Q. You had to send over or go yourself to see the orders were made—do the work in your office?

A. No. I think there was an understanding with Reynolds nothing should be done. They went over by their own momentum. There may have been a clerk sent over to see some continu-

270 ances were made, but I don't remember about it. That case was settled with Reynolds. He donated the right of way.

Q. Your services ought to be worth a good deal in negotiating the settlement. How much were they worth?

A. If I charged for them in the manner I was in the habit of charging for law business I should say $100.

Q. You settled that case as a lawyer; you were an attorney and the only one representing the railroad company?

A. I settled it because I had agreed to get the right of way. I was executing my contract.

Q. The settlement on the part of the Chicago & Evanston Railroad Company, if you had not been a lawyer, would have required the intervention of a lawyer, would it not?

A. No. I should think it might be done by any ordinary agent. My recollection is I did not commence that suit and did not settle it until the latter part of 1881 or the first part of 1882.

Q. Do you remember the case of the Chicago & Evanston Railroad Company against Ruth C. Hale, executrix and trustee?

A. Yes.

Q. How much was it worth to file the petition in that case?

A. $100.

Q. There were a large number of defendants in that case, and serv-

ice on some of them had to be made by publication. A jury was impanelled, the case tried, a verdict, and judgment on the verdict. How much would your legal services be worth for performing that?

271 A. I did not personally try the case. I was out of the city at the time; it was tried by Mr. Chandler, assisted by Mr. M. W. Robinson, who was employed for that purpose.

Q. The fee for that was included——

A. In the amount I have already given.

Q. Mr. Robinson's?

A. Yes.

Q. Do you remember any other legal services in that case which you rendered which you have not stated?

A. I conducted some negotiations trying to fix the amount of damages and trying to procure the right of way without paying any. I went to see Mr. Hale in Massachusetts in April, 1881, and procured from him a promise to donate the right of way, but he died the next month without having fulfilled the promise, and the defendants in this case were his executors and heirs, and they declined to fulfill the agreement we had made. In that case the amount of verdict which was obtained was never paid. After the contract was made with Easton and Carey they changed the route across that land, and new proceedings were had and new damages were fixed, which were afterwards paid.

Q. Do you remember the case of the Chicago & Evanston railroad against Jacob Huber?

A. Yes.

Q. How much was it worth to file the petition in that case?

A. $100.

Q. There was a trial by the court, finding and judgment on the finding, and order for the payment of the judgment. Did you perform that service?

272 A. My impression is that was done after the transfer to Easton and Carey. The petition was filed before, but the disposition of the case, if I remember correctly, was later.

Q. You had nothing to do with that?

A. My recollection is I did attend to fixing the damages in favor of Huber, but it was not paid, and soon afterwards an agreement was made by Mr. Huber with the Evanston, Mr. Walker representing them, in which he took a larger quantity of land and paid a larger sum.

Q. How much were your legal services worth in the trial of that case?

A. I should say $50. The amount of damages was agreed upon before we tried the case.

Q. Do you remember the case of the Chicago & Evanston Railroad Company against James Quirk and John L. Quirk?

A. Yes.

Q. Did you file the petition in that case?

A. Yes.

Q. How much was it worth?

A. $100.

Q. That case was continued for a time. The death of one of the defendants was suggested, and the petition was dismissed at petitioner's cost. How much were those services worth?

A. My impression is that a fair price for what was done in that case was $100 after the petition was filed.

Q. Do you remember the case of the Chicago & Evanston railroad against Fanny J. Howe, widow, and certain heirs-at-law of Francis S. Howe, deceased?

A. Yes, sir.

Q. You filed the petition in that case, did you?

273 A. Yes.

Q. How much was it worth to file that petition?

A. $100.

Q. There were some orders subsequently made in that case—change of name and so on?

A. My impression is Mr. Walker attended to that after the contract was made with Easton and Carey. I don't remember the date of the filing of the petition, but I think it was in the spring of 1882.

Q. June 30, 1882, jury trial, verdict, and judgment on the verdict. Did you try that case?

A. I think not. I think that was attended to by Mr. Walker. If the judgment was entered before August 8, 1882, I attended to it.

Q. Do you remember the case of the Chicago & Evanston Railroad Company *vs.* Joseph Sheffield Porter and twenty-eight other defendants?

A. Yes.

Q. Did you file the petition in that case?

A. Yes.

Q. What was it worth to file the petition?

A. $100.

Q. Did you attend to the trial of that case?

A. Yes.

Q. Do you remember the date of the trial?

A. I believe it was in August, 1882. The day of the month I don't remember; it was near the time the contract was made with Carey and Easton.

Q. Do you know what the value of your legal services was in that case?

A. About $100.

Q. It was a large verdict—$3,900?

A. There was no contest on the trial. The amount was agreed on beforehand.

Q. $100 would cover your entire legal services?

A. The amount received in that case was not paid, but the

274 route was changed and new damages were fixed, which were subsequently paid.

Q. Do you remember the case of the Chicago & Evanston railroad against John Logerman?

A. Yes.

Q. Did you file a petition in that case?

A. Yes.

Q. How much was it worth to file that petition?

A. Oh, it was a matter of small value. I should think $50 would be a reasonable fee for filing that petition.

Q. Did you perform any other legal services in that case after that?

A. I think not; it was settled, and he was paid $275 for the release.

Q. You did not attend to that settlement?

A. Yes; I did.

Q. Were there any legal services involved in it, dismissing the case, and so on, worth charging for?

A. I should say not.

Q. Do you remember the case of the Chicago & Evanston railroad against George M. Pullman and others?

A. Yes.

Q. That petition was filed by you?

A. Yes.

Q. How much was it worth?

A. $100.

Q. Did you perform any other legal service in that case?

A. Some continuances were obtained in court; I don't remember how many; probably it would amount to $100; it was continued a good many times.

Q. Do you remember the case of the same road against John W. Slater and others in the circuit court? Did you file the petition in that case?

A. Yes.

275 Q. How much was it worth?

A. It was worth $100.

Q. Did you perform any other legal service in that case afterwards?

A. I think not. No great negotiations were conducted about the matter outside of agreeing as to fixing the amount of damages and an agreement subsequently made on some conditions by which they released the right of way without any damages.

Q. Do you remember the case of the same road against Hall and six other defendants?

A. Yes; it run side by side with the suit against Slater.

Q. That petition was filed August 30, 1882. Was that before or after the contract with Easton and Carey?

A. That was after. The contract with Easton and Carey was August 8, 1882.

Q. Did you expend any money for the land involved in that suit for right of way for this road out of this $20,000?

A. No, sir; I might have paid for some expenses. I went to New York city, traveling on that business, and also to Providence, and there may have been some travelling expenses incurred.

Q. On such a trip they would be quite large?

A. I was not there exclusively on that business.

Q. Could you fix approximately an amount which would cover it?

A. Not with any accuracy, but probably fifty or sixty dollars.

Q. Do you know of any other suits and petitions for condemnation which were filed by you?

A. I do not now remember any others than those you have suggested.

276 Q. Do you know of any other legal services that you consider legal services that you rendered in procuring that right of way between May 30, 1880, and August 8, 1882, which you rendered and to which you have not testified?

A. I am unwilling to decide what are legal services, being a lawyer and having made a contract have no connection with the profession.

Q. How much was your time worth expended between those two times in and about procuring the right of way for that railroad?

A. As an agent procuring the right of way? I do not know.

Q. As yourself?

A. Having no experience in that respect?

Q. As William C. Goudy, the leading lawyer of Chicago?

A. My services as a lawyer were worth to me about $100 a day when I was engaged in professional business. The number of days I spent about this matter I could not undertake to state now.

Q. Can you state in a lump sum what you considered the services worth which you rendered?

A. I could not. I could not have been hired as a lawyer or as a man to do this for any pecuniary consideration. My only motive was to get a railroad built to develop the sale of some land I had. It was outside of my usual proceedings and the only time in my life when I have ever engaged in any such business.

Q. Did you pay the Chicago & Pacific Railroad Company any money upon settlement of their accounts with the Chicago & Evanston Railroad Company?

A. No, sir; we balanced the accounts.

277 Q. Did you render legal services in settling that account?

A. Yes; I rendered services. Whether they were legal services or not I do not know.

Q. How much were they worth?

A. If I should charge as a lawyer I should charge at least $100; possibly more.

Q. Was there much involved in that?

—. It was an old account which was unsettled, and the figures showed a difference of six or seven thousand dollars. We finally, after some discussion about it, in which we differed as to what was right and what was wrong, agreed to balance accounts without the payment of any money either way.

Q. You think $100 was a fair compensation?

A. Possibly more; possibly twice that. I should think it ought to be twice that.

Q. You would say $200?

A. Yes; it was worth that to me as a lawyer, at any rate.

Q. That was business. If a client came to you you would have accepted as a lawyer, would you not?

A. Yes.

Q. Such as any other lawyer would have accepted?

A. He would not have been employed to do that business.

Q. Wasn't it a lawyer's business?

A. Not necessarily; might have been done by any book-keeper or a competent agent as well as by a lawyer.

Q. Prior to the first of January, 1881, you spent considerable time, did you not, in laying this right of way, selecting the route, and showing the property-owners in that neighborhood about it?

278 A. I think the way had been substantially determined before the contract was made with Stickney. I should say that the route had been substantially determined before the contract with Stickney, but there may have been some changes in it at a later date.

Q. Did you not testify upon the trial of this cause in the circuit court substantially as follows: After settling up the difficulty between the Chicago & Evanston and the Chicago & Pacific Company you proceeded immediately to examine two or three different routes, had plats made showing the lines and curves to show the various property-owners, consulted with them about the location and the damages which would be caused, and endeavored to procure as far as possible gifts of right of way as had been intended, and all this was done before the 15th of July, 1880?

A. I think I did.

Q. Do you know how much time you expended in performing the services I have just spoken of?

A. Between May 28th, 1880, and the middle of July would be six or seven weeks of time.

Q. Your time was worth $100 a day?

A. It was as a lawyer.

Q. Did you not testify upon the hearing of this cause in the circuit court substantially as follows: "About the 1st of January, 1881, I went to work again to procure right of way and spent a larger proportion of my time about it from that time up to the first of June?"

A. I believe I did so testify.

279 Q. Are you able to fix about the amount of time you expended between the first of January, 1881, and the first of June?

A. No; I cannot now any nearer than I testified before.

Q. Are you able to say how much your services were worth between those dates—how much time you spent?

A. It is precisely what I cannot remember—the length of time.

Q. Did you not also testify that by the first of June you did not have the right of way procured and continued to work for a considerable time during June up to the 1st of July with a like result?

A. My remembrance is that I did so testify.

Q. Can you tell how much time you expended then?

A. No; I cannot.

Q. Did you not spend three months of your time between the 1st of January and the 1st of June, 1881, in procuring this right of way?

A. I would not undertake to say because I have no means now of determining. I only know that I spent a considerable period of time between those dates, but I do not recollect enough about it to make any statement that is reliable.

Q. Did you not testify on the hearing of this cause in the circuit court relative to the interview that you had with Mr. Stickney at the Grand Pacific Hotel, in Chicago, June 16, 1882, that you told Mr. Stickney in that interview substantially as follows: that you would give him at that time $7,500 to procure the relinquishment of all claims for damages or all money for the cancellation of the contract, and that you stated to him at that time that you had gone on
280 in good faith and endeavored to get the right of way, and in doing so had expended a greater share of the money?

A. I believe I did so testify substantially.

Q. Did you not testify that you told Mr. Stickney in that interview that you had spent most of this money in the way it was intended to be spent and had some of it left, and in order to be thoroughly fair about it and avoid litigation and have no trouble or feeling about it you were willing to pay $7,500?

A. I think I did.

Q. Did you not also testify upon that hearing relative to the interview between you and Mr. Hill in St. Paul, August 15, 1882, that you had stated in the interview with Mr. Hill that you were not legally liable for anything that you had spent in the procurement of the right of way and rendering your own services, so that more than half of the money had been exhausted; that you were willing to return them about the amount you had not spent as a matter of compromise and as a matter of common fairness. Did you not so testify on the trial?

A. I believe I did testify substantially to that effect. I wish to state, by way of explanation to the answers to the last two or three questions, that I referred not only to the money that I had actually paid out, but also to what I thought ought to be fairly allowed to me for services, and also for a contract or two which I had made which I thought would have to be met by the payment of money, and one of them was the contract I have mentioned with Sheldon—$5,500.

281 Q. Did you upon the trial or in either of these interviews with Mr. Stickney or Mr. Hill say anything about outstanding contracts on which you were liable?

A. No.

Q. Did you not say affirmatively and positively that you had expended this money?

A. I do not recollect the exact words that I used, whether it was actually as cash paid or whether there was a liability.

Q. Have you before this time mentioned to the plaintiff in this case or in court that you had any such contracts outstanding?

A. I do not recollect I have mentioned it in testifying before. I think not, but it is a matter I have mentioned to Mr. Stickney at some time or other.

Q. Had you had interviews with Mr. Stickney since the one with him in St. Paul?

A. No, sir.

Q. You did not mention it to him at that interview?

A. I would not undertake to say whether I did or not. I am very certain I mentioned the fact to him at some time.

Q. Then it must have been before that interview?

A. No; it must have been in St. Paul.

Q. Do you now say you did tell Mr. Stickney that you had outstanding contracts upon which you were liable?

A. No, I don't say that.

Q. You say you think you told him?

A. No; I told him I had made contracts for right of way on which the money had not been paid.

282 Q. Then $7,500 represented approximately the amount unexpended by you?

A. I think it did, according to my recollection.

Q. Does it now represent the amount unexpended by you?

A. No.

Q. What is the amount unexpended by you?

A. I spent out of that fund a considerable sum in this present suit since that time.

Q. How much?

A. I can't tell now.

Q. In all probability a suit will be brought against you for this $20,000, or so much of it as has not been expended by you and not recovered in this case. If such a suit were now pending against you and you now had to defend such suit what sums would you set off as having been expended by you of the $20,000?

A. As the statement is made that such suit is contemplated, I decline to answer.

Q. I withdraw the question that any such suit is contemplated. I am not authorized to make the statement.

A. I still decline to answer.

Q. Then I withdraw the question. If a suit were now pending against you for the amount of this $20,000 not expended by you for right of way under the contract, what amounts would you set off as against that claim?

A. I decline to answer.

Q. What sum have you now in your hands of this $20,000 not expended by you for right of way?

A. That is the same question and I decline to answer.

283 Q. Subsequent to the making of this contract with Stickney & Co. you made a contract with Easton & Carey and other parties by which you conveyed substantially the same property to these other parties, did you not?

A. I decline to answer. I have testified fully on that subject in this same case before, and the question involves conclusions I am not bound to give as a witness.

284 Testimony taken before Henry W. Bishop, master in chancery of said court, the 28th day of May, A. D. 1886.

Present: Mr. Hodges, for complainant; Mr. Walker, for defendant.

WM. C. GOUDY, a witness on behalf of the complainant, being first duly sworn, was further examined in chief by Mr. HODGES, and deposes and says as follows:

Mr. HODGES: In your examination before the master the other day I asked you the following question: "Did you not also testify upon that hearing in regard to the interview between you and Hill, in St. Paul, August 15, 1882, that you had stated in the interview with Hill that you were not legally liable for anything that you had spent in the procurement of the right of way and rendering your own services, so that more than half of the money had been exhausted; that you were willing to return them about the amount you had not spent as a matter of compromise and a matter of common fairness?" You answered as follows: "I believe I did testify substantially to that effect. I wish to state, by way of explanation to the answers to the last two or three questions, that I referred not only to the money I had actually paid out, but also to what I thought ought fairly to be allowed to me for services, and also for a contract or two which I had made which I thought would have to be met by the payment of money, and one of them was the contract I have mentioned with Sheldon of $5,500." The sum which you then offered to return was $7,500, was it not?

A. Yes, sir.

285 Q. That would leave $12,500 which you at that time said you had expended?

A. I did not say I had expended, except with the qualification I made.

Q. $5,500 was for a contract with Sheldon. Was there any other contract outstanding which you now recall?

A. I can't recall definitely, but there were two or three other contracts, my impression is, that were then outstanding. I don't remember about dates now sufficient to answer.

Q. You testified the other day you had expended up to this time $6,513 as the total amount for right of way and for services and costs?

A. My recollection is I testified to about that amount. I have not my memorandum now before me.

Q. $1,000 of that was for money paid to Chandler?

A. Yes, sir.

Q. That would make altogether about $12,000, and would leave for the value of your services only about $500. Do you consider that a fair compensation for your services up to that time?

A. No, sir.

Q. Are you able to say what you do consider a fair compensation for your services?

A. No, sir; I cannot.

Q. Can you state approximately?
A. No, sir.
Q. You know what you did?
A. Yes, sir.
Q. You don't know how much it was worth?
A. No.
Q. In your answer to the bill of complaint filed in this case you state as follows: "And afterwards, on or about the 8th day of August, 1882, this defendant entered into an agreement with
286 J. C. Easton and John W. Carey, by which he agreed to cause to be transferred to the said Easton & Carey 889 shares of the capital stock of the Chicago & Evanston Railroad Company." Was that statement in your answer true?
A. I stated fully on that subject before in this case.

Objected to as immaterial.

A The agreement made with Easton & Carey was in writing, and a copy of it is in the record as testimony in this case, and is printed on pages 303, '4, and '5 of the record.
Q. Was there not a contract or contracts in existence on the 15th of August, 1882, by which you were relieved from any responsibility of the Sheldon contract of which you have spoken?
A. No; not as I understood it. The only contract with Easton and Carey is the one I have just referred to. There was no other contract relating to the Sheldon matter, except the contract itself with Sheldon.
Q. That contract was afterwards assumed by the Chicago & Evanston railroad, was it?

Objected to.

A. No, sir; the contract itself with Sheldon was with the Chicago & Evanston Railroad Company.
Q. What Sheldon was that?
A. Edwin H. Sheldon.
Q. You were liable on that transfer? Can you explain how it was you were liable?
A. On my contract that I made agreeing to procure the right of way—the contract that I made with Mr. Sheldon, he relying on my seeing that it was executed and carried out.
287 Q. A verbal agreement you made with Sheldon, was it?
A. No, sir.
Q. The stock of the road was sold prior to this conversation or your interest in it was sold to some one else?
A. The contract with Easton and Carey was made before that conversation.
Q. You had no further property in the road after the making of that contract with Easton & Carey?
A. I had no property interest in it.
Q. Is it not a fact that you were not at all liable on the $5,500 contract at the time of the conversation with Mr. Hill?

A. That is a question of law about which there might be some difference of opinion. I supposed that I was.

Q. Will you give the reason why you supposed so?

A. No.

Q. Had you made a contract prior to this conversation in which you were entirely relieved from any liability on that contract?

A. That is a question of law again. I made a contract with Easton & Carey and no other.

Q. Did you not suppose at that time you were relieved from any liability on that contract?

A. No.

Q. You say the contract was not in your name—the only liability was a moral one—your promise to Mr. Sheldon?

A. I did not say so.

Q. There was no direct liability of yours to Sheldon?

A. That is a question of law.

Q. Was there a contract between you and Sheldon in which it was expressed that you should be liable on it?

288 A. Not that I know of, unless the written contract with the Chicago & Evanston Railroad Company made me so liable.

Q. Have the parties to whom you sold your interest in the Chicago & Evanston railroad a fund which they have kept back from the purchase price from you out of which they propose to take any sum that they may be compelled to pay under a decree in this reference?

Objected to.

Q. What sum have you now in your hands of this $20,000 not expended by you for right of way?

Objected to as immaterial. Objection sustained. Exception by complainant.

Q. How much of the $20,000 paid to you by Stickney & Co. remains in your hands after deducting all charges for expenses for services of yourself and other attorneys and costs for right of way which were expended for the benefit of the Chicago & Evanston Railroad Company?

Objected to. Objection sustained. Exception by complainant.

Q. How much are you entitled to yourself out of that $20,000 for money paid out by you and for your own services?

Objected to.

A. If I am ever sued for the money I will try to make answer to that question.

289 Cross-examination by Mr. WALKER:

Q. You refer in your examination to a conversation you had in St. Paul with Stickney and with the complainant relative to the

contract of May 28th, 1880. Were you there for the purpose of settling all matters of controversy growing out of that contract?

Objected to as leading.

Q. State whether or not you were there for that purpose.

A. That was the object of my visit.

Q. State whether or not the offer you made to them for payment of the sum of $7,500 was in the nature of a compromise.

A. It was; as I stated before in this testimony, I denied my liability for anything.

Q. You have stated that the aggregate amount paid by you for right of way out of this fund of $20,000 that was paid to you under the contract with Stickney was $6,513. You may state whether any part of that sum was repaid to you by Easton and Carey and the Chicago & Evanston Railroad Company on account of the right of way which had been procured; and, if so, how much?

A. I received from Mr. Easton on account of those sums so paid by me $4,500 in September, 1882.

Q. That covers the amount you received on account of right of way that you procured?

A. Yes, sir, and was to be applied on the $6,513 mentioned in my testimony-in-chief.

290 Mr. HODGES: When did Mr. Easton pay you this $4,500?

A. It was in September, 1882; I believe on the 2nd day of the month.

Q. Was it specified at that time that $4,500 was to be in payment of the amount which you had expended for right of way?

A. Yes, sir.

Q. Was any of it for your services?

A. No, sir.

Q. This money was paid by Mr. Easton, you say?

A. Yes, sir.

Q. And that money was not paid for any subsequent contract you made with Mr. Easton, was it?

A. I had the contract with Easton and Carey at that time; I had expended the sums which I have mentioned in my testimony for the right of way, and he paid me the $4,500 to be applied on such expenditures.

Q. Was that made in pursuance of a contract that you had with Easton or anybody else—that payment to you?

A. That is a question of law; I can only say the only contract I had with Mr. Easton about the right of way or the payment of money touching the Chicago & Evanston road is the one of August 8, 1882.

Q. Is it anywhere provided in that contract that they should pay you for right of way which you had already procured?

A. The contract will show.

Q. I ask you.

A. As a witness I am not bound to answer that question.

Q. Did Mr. Easton pay you for the right of way which you procured for the road prior to that time?

A. No; that was the first payment he made me on the right of way.

291 Q. Has he paid you subsequently for any right of way which you procured prior to the time the transfer was made to Easton and Carey?

A. As I understand it, he has not. I received payment of money under the contract I had with him.

Q. But no other money for right of way?

A. I do not understand it so myself. What his understanding is I don't know.

Q. He has not paid you any other money?

A. Yes, sir; he has.

Q. For right of way procured prior to that time?

A. He has paid me money on the contract, and, as I now recollect, without any specific direction how it should be applied. What his understanding is about the application I don't know.

Q. Did he pay for any other right of way which you contracted for prior to that time?

A. Not that I remember now.

Q. When he paid you this $4,500 he specified it was to be for that right of way?

A. Yes, sir.

Q. When he made you subsequent payments he did not specify it was for the right of way or any other particular thing, but was simply on the contract?

A. That is my recollection of it.

Q. Did he pay you that in a check or in cash?

A. I don't remember.

Q. It was quite a large sum of money, and it was not so long ago. Can you not remember whether it was cash or a check?

A. I have handled several hundred thousand dollars since then.

Q. Do you recollect the specific conversation you had with him at the time in which he specified it was for right of way you

292 had expended? Can you not remember whether he paid you a check?

A. No, sir.

Q. You can remember the conversation you had about it, but cannot remember how the money was paid?

A. No, sir.

Q. Where was that conversation?

A. I don't remember that.

Q. Was it in Chicago?

A. Yes, sir.

Q. Was it in your office?

A. I have the impression it was in the office of the Chicago & Evanston Railroad Company or in Mr. Walker's office, but I have not a distinct recollection.

Q. The only thing you remember about that occasion is that he paid you $4,500 and that he specified it was to be not on the contract, but for right of way which you had already procured and paid for?

A. I have not said that. I remember a good many other things.

Q. What else do you remember about the conversation which bears on the question of the $4,500?

A. Nothing about that.

Q. That was all that was said about the $4,500 being paid?

A. As far as I recollect.

Q. And that is all you can remember about the $4,500 being paid at that time?

A. Yes, sir.

293 Testimony taken before Henry W. Bishop, master in chancery of said court, the 28 day of June, A. D. 1886.

Present: Mr. Hodges, Mr. Walker.

J. C. EASTON, a witness on behalf of the complainant, being first duly sworn, was examined in chief by Mr. HODGES, and deposes and says as follows:

Q. Please state your name, age, residence, and occupation.

A. J. C. Easton; residence, La Crosse, Wisconsin; occupation, private citizen; have something to do with railroads.

Q. You are president of the Chicago & Evanston railroad?

A. Yes, sir.

Q. You are the same J. C. Easton who is the defendant in this case?

A. Yes, sir.

Q. And you were a party to the contract between William C. Goudy and Easton & Carey which has been introduced in evidence in this case?

A. Yes, sir.

Q. Did you in the month of September, 1882, or at any time pay William C. Goudy, for yourself or as agent of the Chicago & Evanston railroad, the sum of $4,500 for right of way, which had been expended by Goudy for right of way of the Chicago & Evanston, which Goudy had procured prior to the making of the contract to which I have just made reference?

A. No, sir; I did not pay it.

Q. Were you present when the sum of $4,500 was paid to Goudy for any such purpose?

A. No, sir.

294 Q. Did you have any conversation with Mr. Goudy at the time that money was paid about it?

A. No, sir; we have not referred to any money being paid. You asked me if I paid any such money and I said no. What money do you mean?

Q. You were not present when it was paid?

A. What was it?

Q. When any such $4,500 was paid to Goudy.

A. No; I was not present.

Q. Have you or Mr. Carey, to your knowledge, reserved from the purchase price which you had agreed to pay Goudy on the contract

to which I have already made reference—reserved a part of the purchase price, from which you propose to deduct any sum which may be decreed against the road or against you or Mr. Carey in this suit?

Objected to as immaterial and not relevant to the issue and because the plaintiff has no right to go into this inquiry under the order of reference in this case.

295 Cross-examination by Mr. WALKER:

Q. You say that you did not pay Mr. Goudy the sum of $4,500 or any other sum on account of payments made by him for right of way. Have you any knowledge of the Chicago & Evansville railroad making payments to Goudy?

A. Yes, sir.

Q. At what date?

A. The 2nd day of October, 1882.

Redirect examination:

Q. Do you know of your own knowledge that the Chicago & Evanston Railroad Company paid Mr. Goudy on the 2d of October for right of way procured prior to the making of the contract between you and Goudy?

A. The company paid $7,000, and I think this $4,500 was for right of way.

Q. Was it for right of way procured by Goudy prior to the making of the contract between you and Goudy?

A. It was right of way we procured.

Q. When was the right of way procured?

A. I suppose the deeds will show that. I think the deeds themselves are a great deal better evidence than my recollection.

Q. Was that payment made by the Chicago & Evanston, if you know, in pursuance of the contract which you made with Goudy?

A. I think it was.

Q. It was?

A. Yes, sir.

Q. Did you get a voucher for that?

A. Mr. Walker took a voucher for it. Mr. Walker paid the $7,000.

296 Q. Do you know of your own knowledge it was to be for right of way?

A. The account was itemized. I can tell exactly what it was for. There was seven thousand eight hundred and odd dollars, and about $4,500 for right of way.

Q. How do you know the Chicago & Evanston paid that, if you were not present when it was paid?

A. It was paid by Mr. Walker; the Chicago & Evanston paid it through Mr. Walker.

Q. How do you know it?

A. The books will show it.

Q. Do you know it yourself?

A. I know positively it was paid—absolutely and positively—paid by the Chicago & Evanston, through Mr. Walker.

Q. Did you ever see vouchers which the company received for it?

A. Yes, sir.

Q. What did it say?

A. Received of E. Walker, on such an account, $7,000.

Q. What account?

A. The account he put in—$4,500 for right of way and the balance miscellaneous expenses.

Signature waived.

297 Testimony taken before Henry W. Bishop, master in chancery of said court, the 10th day of July, A. D. 1886.

Present: Mr. Hodges, for complainant; Mr. Walker, for defendant.

EDWIN WALKER, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. HODGES, and deposes and says as follows:

Q. State what the instrument you hold in your hand is.

A. On the 2nd of October, 1882, I paid Mr. Goudy on behalf of J. C. Easton $7,000, and took from him a receipt, of which the following is a copy:

"Office of Goudy & Chandler, 162 Washington St., Chicago.

William C. Goudy. George H. Chandler.

$7,000. OCTOBER 2, 1882.

Received of E. Walker seven thousand dollars on account of contract with J. C. Easton and J. W. Carey of August 8, 1882, with regard to Chicago & Evanston Railroad Company.

W. C. GOUDY."

Mr. HODGES: I offer this paper in evidence.

Q. Were you a director prior to that time in the Chicago & Evanston Railroad Company?

A. I was.

Q. Were you familiar with the accounts and money transactions of the road?

A. I was familiar with many of the business transactions of the company, but not personally familiar with all the money accounts.

298 Q. You were acting as attorney for the road?

A. I was general solicitor of the company.

Q. Do you know whether or not J. C. Easton or any one else paid for the road during the months of September or October, 1882, the sum of $4,500 to W. C. Goudy for right of way procured by him for the road prior to June 13th, 1882?

A. I have no knowledge of any payment made to Mr. Goudy to

be applied especially upon right of way procured upon that contract between Mr. Goudy and Easton and Carey.

I wish to make a further statement: On October 7, 1882, Mr. Goudy rendered the company, or rather addressed me a letter, which is already in evidence, of which the following is a copy:

"Office of Goudy & Chandler, 162 Washington St.

W. C. Goudy. Geo. Chandler.

CHICAGO, *Oct.* 7, 1882.

Mr. Walker:

D'R SIR: This is memorandum of sums to be paid to satisfy condemnation suits:

Huber, $1,526. This may be changed if curve near Fullerton Ave. is altered.

Sheffield executors, $3,000; same condition as last.

Poor Handmaids of Jesus Christ, $700. This may be changed if curve South Belmont is changed.

C. O. McCagg, $4,000; same as last.

Passivant, $700.

299 Hales' executors, $3,722.

Isaac H. Birch, $231.

More further north; can wait a few days.

If the change of curves are made it will probably require an increase of $6,000 to $9,000, as nearly as I can guess.

Yours, W. C. GOUDY."

The Chicago & Evanston Railroad Company to W. C. Goudy, Dr.

To cash paid, costs, witnesses, and disbursements in condemnation suits	$520 75
To cash paid attorneys for procuring right of way	500 00
To cash paid James Quirk for right of way over the west thirty-three (33) feet of lot one (1), in block 43, Sheffield's Addition to Chicago	775 00
To cash paid Sam'l E. Gross for right of way over the east 33 feet of block 9, of subdivision of the N. E. ¼ of the N. W. ¼ of section 29, in Lake View	800 00
To cash paid A. H. Burley, trustee, for right of way over the west 25 feet of block 8, in the subdivision of the N. E. ¼ and part of the S. E. ¼ of section 29	800 00
To cash paid John Logerman for damages to his leasehold interest in the east half of the S. W. ¼ of section 20, in Lake View	275 00
To cash paid Theron Pardee for right of way from Nellie avenue, in Laflin, Smith and Dyer's subdivision of the N. E. ¼ of section 20, to Grace avenue	1,573 00
To cash paid J. H. Hubbell for right of way over lot one (1) of Tussey & Finnemore's subdivision of the S. E. ¼ of section 8, in Lake View	100 00
300 To cash paid, miscellaneous expenses	2,500 00
To services obtaining right of way	$7,843 75

Same, Cr.

1882.
Oct. 2. By cash on account---------- $7,000 00

This refers to right of way and judgment in condemnation cases and to contracts that had been entered into, but the consideration had not been paid at the time of the contract between Easton and Carey and Goudy. At the same time Mr. Goudy rendered his statement of account, a copy of which is hereto attached. The account was rendered for moneys paid by Mr. Goudy for procurement of right of way after the execution of his contract with Easton and Carey, and does not refer to any payments made for right of way prior to the execution of such contract.

Q. Does this statement embody all the items which Mr. Goudy has heretofore testified before the master were expended by him for right of way?

A. It is my understanding that it does. Under the eighth section of the Easton and Goudy contract Mr. Goudy undertook to procure the entire right of way for the sum of $30,000, and, as I understand it, the right of way was procured under such clauses and the account was rendered for moneys advanced by him in the procurement of the right of way; afterwards the company concluded to procure the balance of the right of way and has done so, leaving the account of Mr. Goudy for moneys advanced under such section unadjusted,
and there has been no settlement in the matter up to the
301 present time.

Q. Do you know whether or not the Chicago & Evanston Railroad Company received any right of way or deeds of right of way for which W. C. Goudy expended any money prior to the making of the contract between Easton and Carey and himself?

A. I have had careful examination made of all the right of way papers and deeds that were executed prior to the date of the contract between Goudy and Easton and Carey, as well as the deeds which have been executed since that date, and have in my possession the deeds which were executed prior to that date.

On May 17th, 1881, John F. Stafford conveyed a certain right of way to the Chicago & Evanston railroad for the consideration expressed in the deed of $10; that lapsed for non-fulfillment of contract and the company holds the same premises under a deed executed by F. R. Schmitt, bearing date January 23, 1883; for this conveyance the railroad company paid to the grantors the sum of $1,400.

On the 8th day of August, 1882, John M. Cannaroe and wife by deed conveyed to the company certain right of way in the town of Lake View for the consideration of $10; that conveyance also lapsed for non-performance on the part of the grantee, and the railroad company on the 1st day of February, 1883, acquired title to the same premises by deed of the grantors for the consideration of $10.

Also on the 29th of September, 1881, Peleg Hall and others conveyed to the Chicago & Evanston Railroad Company certain
302 right of way described in said deed for the money consideration of $1.00. There are other covenants expressed in the

deed, but no money consideration save the sum of $1.00. I have no personal knowledge of these matters or of the consideration paid except as expressed in the deeds which I have given, and I make my statements from the deeds themselves.

The deeds that I have offered in evidence and referred to are all the deeds in the possession of the company, conveying the right of way prior to the execution of the contract between Goudy and Easton and Carey. There are no other deeds save the ones that I have offered in evidence. The contracts show a conveyance of right of way to the company prior to the contract between the parties referred to.

EDWIN WALKER.

Subscribed and sworn to before me—

H. W. BISHOP,
Master in Chancery.

303 Testimony taken before Henry W. Bishop, master in chancery of said court, Wednesday, the 18th day of August, A. D. 1886.

Present: Mr. Edwin Walker, Mr. L. M. Hodges.

WILLIAM C. GOUDY, a witness on behalf of the —, being first duly sworn, was examined in chief by Mr. HODGES, and deposes and says as follows:

Mr. HODGES:

Q. You testified on a previous hearing on this reference that Mr. Easton paid you $4,500 for himself or for the Chicago & Evanston railroad of the money which you had expended for the right of way for the road which you had procured prior to the making of the contract between you and Easton and Carey. Mr. Easton has testified that he never paid you any such sum. Mr. Walker has testified that the road did not pay you any such sum to be applied especially on right of way procured prior to that contract. Mr. Walker has also testified that the sums which you have given as expended by you for right of way were expended by you, as he understands it, in procuring right of way for the road in pursuance of a certain clause of the contract between you and Easton and Carey, in which clause you had agreed to procure the right of way or were given an option to procure the right of way for $30,000. Will you explain or give your understanding of that transaction and those payments which were made by you?

304 A. As I understand it, I have given all the facts within my knowledge on those subjects heretofore in testifying in this case.

Q. Is that your answer?

A. Yes, sir.

Q. Did you pay out any money for right of way for the road prior to the making of the contract between you and Easton and Carey?

A. Yes, sir.

Q. What sums did you pay and to whom?

A. I have no memoranda now before me or accessible to refer to to give the dates of the payments and to whom paid, and cannot state the times, amounts, or persons. As I have testified heretofore, some payments may have been made after the date of the contract with Easton and Carey, which I had undertaken to pay before that time. All the sums I have heretofore mentioned as being paid which were chargeable to the fund received from Stickney were for right of way that I had arranged for before the contract with Easton and Carey. Some of the sums were paid, according to my best recollection, after that time.

Q. Were they not all paid after that time—all the considerations more than mere nominal considerations which were paid for this right of way and given in evidence on this hearing—were they not all paid after the Easton and Carey contract was made?

A. According to my recollection they were not all paid after that time.

305 Q. Have you any means by which you can ascertain when they were paid?

A. Yes, sir.

Q. What are they?

A. I have some memoranda I might look up to get the dates.

Q. Can you get them, so we can introduce them in evidence here, or so you can testify to the times of payment after refreshing your memory?

A. Yes, sir; but not to-day.

Q. Did you not undertake to procure the right of way for the Chicago & Evanston road under the clause in your contract with Easton and Carey by which you had an option to procure right of way for the road for $30,000?

A. I made that contract with the provision as it now appears in it, and it was subsequently rescinded.

Q. The contract was subsequently rescinded?

A. That provision of the contract.

Q. Was it rescinded before or after you undertook to procure right of way under that clause, if you did undertake it?

A. I undertook it when I signed the contract.

Q. Did you proceed under that clause to get the right of way?

A. I commenced to procure right of way, but it was subsequently abandoned and rescinded.

Q. You rendered a statement to the Chicago & Evanston road of right of way which you had procured, did you not, after the making of this Easton and Carey contract?

A. I don't think I did. I rendered some account of some

306 part of it, but never any full, complete statement.

Q. You rendered a statement which showed you had expended about $7,000?

A. I presented some account, but it did not include all that was done and was not a full statement; there never has been a full statement made.

Q. Were the sums expended for right of way which you included

in the statement which you did make to them; were those sums expended in pursuance of that contract with Easton and Carey?

A. Any account that I presented to them I presented it because I thought they were liable for it under that contract.

Q. You did present them with an account, did you?

A. Yes; at one time.

Q. Did that not include all the items which you have testified here you have expended and which you charged against the fund?

A. It includes some of them; whether all or not I don't now remember.

Q. How is it you now say that these sums which you have testified you expended for right of way should be charged against this fund when you at one time charged them to the Chicago & Evanston road?

A. I do not know any explanation I can give of that, except I was authorized to pay for right of way out of the fund re-
307 ceived from Stickney, and I subsequently presented an account for procuring right of way under the contract with Easton and Carey. If they covered the same items, then Easton and Carey refunded to me the money that I had advanced out of the Stickney money.

Q. Easton and Carey say they never paid you any money. Do you now say your statement is true—that Mr. Easton paid you $4,500 on that contract?

A. What I stated was that Mr. Easton paid $4,500, which was to be applied on right of way procured, and for which I had paid or become liable to pay from the Stickney money.

Q. Do you still adhere to that statement?

A. I do. Perhaps I ought to say at the time the $4,500 was paid I received the sum of $7,000, but of that sum $4,500 was applied by me on the items I have named. There was no separate sum of $4,500 paid me.

Q. Was it not a check payable to your order made by Mr. Walker for $7,000?

A. May have been.

Q. Did you not give a receipt in which it said it was $7,000, to be applied on the contract between Easton and Carey and you?

A. I signed a receipt; I don't remember what it stated.

Q. Did you know at the time what it stated?

A. I presume I did. I am not in the habit of signing papers without reading them.

WILLIAM C. GOUDY.

Complainant rests.

308 Subscribed and sworn to before me—

H. W. BISHOP, *Master, &c.*

Endorsed: Filed Jan'y 31, 1887. Wm. H. Bradley, clerk.

309 Afterwards, to wit, on the twenty-fourth day of February, 1887, came the Chicago and Evanston Railroad Company, by

its solicitor, and filed in said clerk's office its exception to the master's report in said entitled cause; which said exception is in the words and figures following, to wit:

Exceptions.

In the Circuit Court of the United States for the Northern District of Illinois.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD *et al.* } In Chancery.

Exceptions taken by the defendant, The Chicago and Evanston Railroad, in the above-entitled cause to the report therein of Henry W. Bishop, one of the masters in chancery of said court, to whom said cause was referred, which report was filed on the 31st day of January, A. D. 1887.

First exception. For that the said master reported as his finding that W. C. Goudy paid for right of way for the use and benefit of said company in execution of contract between himself and A. B. Stickney & Co., bearing date the 28th of May, 1880, the sum of sixty-five hundred and thirteen $\frac{00}{100}$ ($6,513.00) dollars, which said finding of the master is not supported by the proof; but, on
310 the contrary, it does appear, under the proof reported by the said master, that said sum of money was expended by the said Goudy under his contract with Easton and Cary, and that said entire sum was paid to the said Goudy by the said Easton and Cary.

Wherefore the said defendant prays that this exception may be allowed, and that said finding be set aside.

E. WALKER,
Solicitor for Defendant, Chicago and Evanston Railroad.

Endorsed: Filed Feb'y 24, 1887. Wm. H. Bradley, clerk.

311 Afterwards, to wit, on the twenty-fifth day of February, 1887, came the complainant, by his solicitors, and filed in said clerk's office his exceptions to the master's report in said entitled cause; which said exceptions are in the words and figures following, to wit:

Exceptions.

In the Circuit Court of the United States, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Exceptions taken by the above-named complainant to the report of Henry W. Bishop, the master in chancery to whom this cause was referred to take proofs and report to the court by an order made herein on the — day of ——, and which report was filed herein on the 31st day of January, 1887.

First exception. For that the said master erred in sustaining the objection of counsel for the defendant to the following question propounded to the witness Wm. C. Goudy by counsel for the complainant:

Ques. "Have the parties to whom you sold your interest in the Chicago and Evanston railroad a fund which they have
312 kept back from the purchase price from you out of which they propose to take any sum that they may be compelled to pay under a decree in this reference?"

Second exception. For that the said master erred in sustaining the objection to the following question propounded to the witness Wm. C. Goudy:

Ques. "What sum have you now in your hands of this $20,000.00 not expended by you for right of way?"

Third exception. For that the said master erred in sustaining the objection to the following question propounded to the witness J. C. Easton by counsel for the complainant:

Ques. "Have you or has Mr. Cary, to your knowledge, reserved from the purchase price which you have agreed to pay Goudy on this contract to which I have already made reference a part of the purchase price from which you propose to deduct any sum which may be decreed against the road or against you or Mr. Cary in this suit?"

Fourth exception. For that the said master has erred in disregarding the evidence as to the value of the legal services rendered by Wm. C. Goudy in procuring right of way for the Chicago and Evanston Railroad Company, in not reporting the value of said services to the court, and in excluding from the amount found
313 by him in said report the value of said legal services.

Wherefore the said complainant does except to the said report and appeal therefrom to the judgment of this court.

GERDON E. COLE,
STILES AND LEWIS,
Solicitors for Complainant.

Endorsed: Filed Feb'y 25, 1887. Wm. H. Bradley, clerk.

313½ Afterwards, to wit, on the ninth day of June, in the adjourned May term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now come the parties, by their solicitors, and this cause comes on to be heard upon the defendants' exceptions to the master's report herein, and after hearing the arguments of counsel the court takes the same under advisement.

314 Afterwards, to wit, on the fourteenth day of July, in the July term of said court, 1887, in the record of the proceedings thereof in said entitled cause, before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Decree.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY, The Chicago, Milwaukee & St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith. } In Chancery.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof,
315 it is ordered, adjudged, and decreed as follows, viz: That the exceptions of both the complainant and the defendant, The Chicago and Evanston Railroad Company, to the report of the master in chancery filed herein on the thirty-first day of January, 1887, be, and the same are hereby, overruled and the said report approved and confirmed; that said Chicago and Evanston Railroad Company do forthwith pay unto said complainant the sum of sixty-five hundred and thirteen dollars ($6,513), together with interest upon the same from the thirtieth day of January, 1887, at the rate of six per cent. per annum, and also the costs of said reference to

the master, to be taxed by the clerk of this court, and also the costs of this suit, for which plaintiff may have execution.

It is further ordered and decreed that all other relief prayed in the complainant's bill be denied as against said defendant, The Chicago and Evanston Railroad Company, and that the complainant's bill be dismissed out of court for want of equity as against the remaining defendants, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, with their reasonable costs, to be taxed by the clerk, and that they have execution therefor against the said complainant.

316 And thereupon the complainant prays an appeal to the Supreme Court of the United States, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law and with security to be approved by the court.

317 Circuit Court of the United States, Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON R. R. CO. *et al.*

Deposition of Henry P. Upham, a witness of lawful age produced, sworn, and examined before William A. Spencer, a special examiner appointed by the court in the above-entitled cause, on behalf of the defendants upon the interrogatories hereto annexed, commencing at 10 o'clock in the forenoon, at his office, in the United States custom-house, in St. Paul, Minn., on the 18th day of February, 1885.

Present: Gordon E. Cole, Esq., sol'r for complainant.

Interrogatories to be Proposed to Henry P. Upham on Behalf of the Defendants.

1. What is your name, residence, and occupation?

A. My name is Henry P. Upham; my residence is St. Paul, Minn.; I am the president of the First National Bank of St. Paul.

2. What was your occupation in April, 1880?

A. I was the cashier of the First National Bank of St. Paul in April, 1880.

3. State whether or not you received in April, 1880, a letter from W. C. Goudy, purporting to be written from the National

318 Hotel, Washington, D. C., dated on or about the 15th day of April, 1880; and, if yea, please attach the same to your deposition as an exhibit. If it is not in your power to furnish the original letter please attach a true copy thereof.

A. I did receive the letter mentioned in this interrogatory and

have the same in my possession, but prefer to retain it. The annexed Exhibit A is a true copy of such letter.

4. If you are unable to furnish the original or a copy of said letter, please examine the paper shown you by the examiner, purporting to be a copy of such letter, and state whether or not it is a true copy and attach the same to your deposition as an exhibit.

A. In my answer to the last interrogatory I have stated that Exhibit A is a true copy of the letter therein referred to, and that I prefer to retain the original in my possession.

5. State whether or not you made any reply to said letter; and, if so, please attach a copy of such reply as an exhibit to your deposition.

A. I did make reply to such letter. A copy of the same is in my letter book, and I prefer to retain the same in my possession. Exhibit B, hereto attached, is a true copy of such reply.

6. If you cannot furnish such copy please examine the paper now shown you by the examiner, purporting to be a copy of a letter dated April 19th, 1880, written by you to Mr. Goudy, and state
319 whether or not it is a true copy of your reply to the letter of Mr. Goudy and attach the same to your deposition as an exhibit.

A. Exhibit B, mentioned in my answer to the last interrogatory, is a true copy of the reply to the letter of Mr. Goudy mentioned in this interrogatory.

7. Were the statements in your said reply true?

A. They were, to the best of my knowledge and belief.

8. Please attach to your deposition the letter to you dated April 19th, 1880, referred to by you in your said reply and quoted as follows: "We, the undersigned, hereby guarantee the ability of A. B. Stickney to carry out and perform a certain contract with the Chicago and Evanston R. R. Co., mentioned in a letter from W. C. Goudy dated Washington, D. C., April 15th, 1880," and if it is not in your power to furnish the original letter please attach a copy thereof, with the signatures, as an exhibit to your deposition.

A. I have the letter of the date April, 19 1880, but decline to part with it. Exhibit C, hereto attached, is a true copy of such letter.

9. Whose signatures were affixed to that letter?

A. The signatures of Jas. J. Hill and R. B. Angus.

10. Who furnished you that letter?

A. I don't remember whether the letter came to me by mail or by messenger. The body of the letter is in the handwriting of James J. Hill.

11. State whether or not you wrote to Mr. Goudy on or
320 about the 9th day of October, 1883, in regard to the name of the signers of that letter to you. If yea, please attach a copy of your letter. If you cannot furnish a copy thereof please examine the paper now shown you, purporting to be a copy of such letter, and state whether or not it is a true copy thereof, and attach the same to your deposition as an exhibit.

A. I did; Exhibit D, hereto attached, is a true copy of such letter of October 9th, 1883.

12. What was your letter to Mr. Goudy dated October 9th, 1883, a reply to?

A. It was my second reply to Mr. Goudy's letter of September 26, 1883. My first answer to said letter of September 26, 1883, was dated September 29, 1883, at which time I was unable to find the letter referred to.

13. If you say it was in reply to a letter from Mr. Goudy please attach the same to your deposition, or if you cannot furnish the original attach a copy of said letter, or if you cannot produce either the original or a copy state its contents.

A. I have the letter of Mr. Goudy of date of September 26, 1883, mentioned in my last answer, and prefer to retain it in my possession. A true copy of such letter is hereto attached, marked Exhibit E.

GOUDY AND CHANDLER, *Sol'rs.*

321 The complainant's solicitor, before the interrogations were propounded to the witness, objected separately to each and every of the foregoing interrogations on the ground that the evidence sought to be elicited is irrelevant, immaterial, and incompetent.

Cross-examination—Mr. COLE:

Q. You referred in your answer to the 12th direct interrogatory to a prior answer to Mr. Goudy's letter of September 26, 1883. Please attach a copy of the letter therein referred to — this interrogatory.

A. The paper hereto attached, marked Complainant's Exhibit F, is a true copy of such letter.

HENRY P. UPHAM.

EXHIBIT A. Wm. A. Spencer, Special Examiner.

Copy.

WASHINGTON, D. C., *April* 15, 1880.

SIR: I am requested by Mr. A. B. Stickney, of St. Paul, to ask you the following questions:

First. Is Mr. Stickney authorized to make a contract with the Chicago and Evanston Railroad Company for certain persons and himself under the name of A. B. Stickney and Co. so as to legally bind all of them?

Second. Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?

Third. Have they furnished you their names and author-
322 ized you to give the information called for by the two preceding questions?

An immediate answer addressed to me at 162 Washington St., Chicago, will oblige

Yours respectfully, W. C. GOUDY.

To the cashier of the 1st National Bank of St. Paul.

EXHIBIT B. Wm. A. Spencer, Special Examiner.

Copy.

ST. PAUL, MINN., *April 19th*, 1880.

W. C. Goudy, Esq., 162 Washington St., Chicago, Ills.

SIR: Your letter of 15th inst. is rec'd. You ask, first, "Is A. B. Stickney authorized to make a contract with the Chicago and Evanston Railroad Company for certain persons and himself, under the name of A. B. Stickney and Co., so as to legally bind all of them?" He is so authorized. I do not know about the use of the name A. B. Stickney & Co. You ask, second, "Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?" They are, beyond any question whatever. You ask, third, "Have they furnished you their names and authorized you to give the information called for by the two preceding questions?" Yes, as follows (copy of letter to me dated Ap'l 19, 1880): "We, the undersigned, hereby guarantee the ability of A. B. Stickney to carry out and perform a certain contract with the Chicago and Evanston R. R. Co., mentioned in a letter from W. C. Goudy dated Washington, D. C., Ap'l 15th, 1880." All parties concerned are of the highest respectability and are men who will keep any engagement entered into. If the trade is made with Mr. Stickney you can depend upon its being carried out to the letter as agreed.

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Resp'y, H. P. UPHAM, *C'r.*

EXHIBIT C. Wm. A. Spencer, Special Examiner.

APR. 19TH, 1880.

H. P. Upham, Esq., cash'r 1st Nat. Bank, St. Paul.

DEAR SIR: We, the undersigned, hereby guarantee the ability of A. B. Stickney to carry out and perform a certain contract with the Chicago and Evanston R. R. Co., mentioned in a letter from W. C. Goudy dated Washington, D. C., April 15th, 1880.

This letter to — held by you and kept strictly confidential, unless there shall be a default on the part of said Stickney.

Yours truly, JAS. J. HILL.
R. B. ANGUS.

324 EXHIBIT D. Wm. A. Spencer, Special Examiner.

Copy.

ST. PAUL, MINN., *Oct. 9th*, 1883.

W. C. Goudy, Esq., 162 Washington St., Chicago, Ills.

DEAR SIR: I have found your letter of Ap'l 15th, 1880, attached to which was the missing letter quoted by me to you 19th April, 1880. (Your letter was written from Washington, D. C., on a letter-head of the National Hotel, and so got into wrong file.)

The signers of the letter are James J. Hill, of this city, and R. B. Angus, now of Montreal.

Resp'y,

(Signed) HENRY P. UPHAM.

EXHIBIT E. Wm. A. Spencer, Special Examiner.

CHICAGO, *Sept. 26th*, 1883.

Mr. H. P. Upham, 1st National Bank of St. Paul.

SIR: On the 19th of April, 1880, you wrote me in answer to certain questions and gave the copy of a note left with you by certain persons guaranteeing the performance of a contract of A. B. Stickney with reference to the Chicago & Evanston railroad, but did not furnish the names of the signers.

325 At a future time these names were to be given to me. The time has come when it is necessary for me to have that information.

Will you please send a full copy, including the names signed thereto, and oblige

Yours respectfully, W. C. GOUDY.

COMPLAINANT'S EXHIBIT F. Wm. A. Spencer, Special Examiner.

Capital, $1,000,000; surplus, $500,000.

ST. PAUL, MINN., *Sept.* 29, 1883.

W. C. Goudy, Esq., 162 Washington St., Chicago, Ills.

DEAR SIR: Your letter of 26th inst. is rec'd. I have looked over my letter copy book and find my letter to you of 19th April, 1880, but do not find that I again wrote you that year. I have looked over files of letters rec'd, but do not find your letter to me of April 15th in response to which I wrote you April 19th, or the letter which I therein quote, so at this time I am unable to respond to your request for further information. You wrote: "At a future time these names were to be given me." It does not appear from my letters that I engaged to furnish names, although I, of course, have no objection to so doing if I can find the document quoted. I will cause further search to be made and will send you copy if found.

Resp'y, H. P. UPHAM.

Endorsed: Filed Feb'y 20, 1885. Wm. H. Bradley, clerk.

326 In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

JAMES J. HILL
vs.
THE CHICAGO & EVANSTON RAILROAD COMPANY *et al.*

Master's Report of Evidence.

To the honorable the judges of said court:

I, Henry W. Bishop, master in chancery, to whom by an order of said court the above-entitled cause was referred for the purpose in said order expressed, hereby report that on the sixth (6th) day of November, A. D. 1884, and upon other days mentioned in the testimony herewith reported, I was attended by Mr. John W. Ela and Mr. Judge Cole, on behalf of the complainant, and by Mr. John N. Jewett and Mr. Edwin Walker, on behalf of the defendants, and the testimony of Messieurs Frank R. Grover, Edwin Walker, John W. Ela, William C. Goudy, J. C. Easton, George Chandler, V. C. Turner, and John W. Carey was taken before me except where by con-
327 sent by L. W. Burnham, U. S. com'r, to be reported by me, said witnesses having been duly sworn, and is herewith reported, together with the exhibits referred to in said testimony.

All of which is respectfully submitted.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated January 31, A. D. 1885.

Testimony of Frank R. Grover, a witness on behalf of complainant, taken before H. W. Bishop, on Saturday, the sixth day of November, A. D. 1884.

Int. 1. Please state your name, age, residence, and occupation.

A. Frank R. Grover; residence, Evanston; occupation, attorney-at-law.

Q. State whether you made any examination of the work being done on the line of the Chicago and Evanston railroad, as to who it was being done by, &c.; and, if so, when it was, and what the result was.

328 A. Along in February, 1883, about the middle of the month, I went upon the line of the Chicago & Evanston railroad, that portion of the line that was north of the city limits of the city of Chicago, and found about, I should say, forty to fifty men engaged in construction on the line who were at work near the Graceland station on the right of way. They had an engine and several cars bearing the initials of the Chicago, Milwaukee & St. Paul Railroad Company.

Q. What were they doing?

A. They were, at the time I first met them, constructing side tracks by the station I have spoken of, and after that time they went

out to the end of the construction near the end of the north line of Lakeview township on the right of way.

Q. What were they doing there?

A. They commenced unloading a lot of ties and rails on these cars I have spoken of.

Q. Did you see them laying ties and rails?

A. Not at the end of the line, because I came away. I saw them laying rails and ties on the side track, but the end I did not, because I came away while they were unloading the material.

Q. Did you see anything else there with the initials of the Milwaukee & St. Paul Company?

A. I did. There was one box car and, I think, from one to three flat cars bearing the same initials, perhaps more, but that is
329 my recollection.

Q. Did you see any labels or other marks on the cars?

A. Nothing that I noticed except those initials.

Q. Any labels, tag, or anything of that kind?

A. Not at this time.

Q. Have you mentioned that you saw — there that had these initials on?

A. No, sir; the men were working with a number of tools, hammers, spades, and different tools that are used in railway construction at the time I mentioned.

Q. How were they marked?

A. They were marked with the same initials I have mentioned, as near as I can recollect—that is, they were marked with the initials representing the St. Paul Company; whether it was R. R. or Ry. Co. I could not recollect, but the same initials I have spoken of.

Q. State whether you heard the foreman in charge of the men make any statements in regard to who the men were at work for during the time they were doing this work.

Objected to.

A. I did; I asked the foremen who the men were at work for.

Mr. WALKER: We object to the witness stating anything that was said to him by the men engaged in the work.

A. He said they were in the employ of the Milwaukee & St. Paul Company, both he and the men, and were paid by that
330 company.

Q. State whether you heard the engineer of the locomotive employed there make any statement in regard to who the locomotive belonged to or who he was at work for in doing this work.

Same objection.

A. I did. I asked the engineer in charge of the locomotive I have mentioned who the locomotive belonged to and whether he was in the employ of the St. Paul Company. He answered that the locomotive belonged to the St. Paul Company and that he was in the employ of the St. Paul Company.

Q. Did he say anything about who the cars belonged to?

A. Not that I recollect.

Q. State whether the foreman made any other statements at that time in regard to the track that had been laid on the line of road; and, if so, what it was.

Same objection.

A. He did. He stated that he had been in charge or control of the construction up to the place where the track was laid at that place, which, as I have stated, was the north line of Lake View township.

Q. State in what manner the work was being done of laying the track and rails.

A. Up to this station at Graceland the track seemed to be in fair condition, but north of there, covering about a mile, I should
331 say, of the road, it was laid in a very hasty manner—that is, there was no grading done; simply the ties laid down on top of the ground and the rails spiked to them, without any grading or dirt under the ties; just laid over the ground in its natural condition. Of course, the brush and trees were cleared away.

Q. State whether the track was even or uneven.

A. Very uneven, indeed, some places being from three to five feet above others in going a distance of two or three hundred feet; so much so that the construction train I have spoken of had to run very slowly to get over the road, and it sometimes stopped.

Q. State whether you were there or not soon afterwards.

A. I was.

Q. When was that?

A. February 18, 1883.

Q. What did you see there then?

A. The track was in about the same condition; had been extended a little further—that is, there had been a little more track laid in the same condition, and I saw several new flat cars there.

Q. Where?

A. On the track.

Q. New flat cars?

A. Yes, sir; bearing the initials of the Chicago & Evanston R. R. Co.

Q. State whether in addition to these initials there was any label or tag on the cars.

332 A. I examined all the cars that were there—some three or four—and found on one of them a tag. The others seemed to have had tags on them, but they have all been torn off.

Q. Have you got that tag?

A. I have.

Q. Will you produce it?

A. Yes, sir. I have the tag and will attach it to my testimony, marked Exhibit A.

Q. You got that from one of these cars?

A. I did. It was tacked on one of the Chicago & Evanston flat cars I have mentioned. I tore it off and brought it away.

Q. Had the cars ever been used?

A. No; they were quite new, although there were some new rails and some new ties on them. They certainly had not been used but very little.

Q. State whether they were the same cars you saw when you were there before.

A. No; I don't think I saw Chicago & Evanston cars when I was there the first time, but the Chicago, Milwaukee & St. Paul cars were there the first time.

Cross-examination by Mr. WALKER:

Q. What is your business?

A. I am in the employ of Ela & Parker as law clerk, and also a member of the bar for myself.

Q. Were you in their employ at the time you made an examination of this railroad?

A. I was.

333 Q. Have you ever been an engineer?

A. No, sir. I run a stationary engine at one time.

Q. Do you know anything about the method of constructing a railroad?

A. Simply what I know from observation and the way the work is generally done. I live by the side of the railroad track where such construction is often done.

Q. You say there was no grading done at the time you visited the premises north of Graceland.

A. No; I didn't say that. For about a mile of the north end of the track it was not graded. I think, however, the place where it was not graded commenced about the north end of Graceland cemetery.

Q. The men you saw were engaged in the construction of this railroad?

A. When I first saw them they were engaged in constructing a side track at Graceland cemetery.

Q. That is part of the railroad?

A. I presume so.

Q. They were engaged in the construction of this road?

A. Yes, sir; if the road is part of it.

Q. You say you tore the tag off the car that was standing there?

A. I did. Not there at Graceland. That was subsequent to the time.

Q. You took it off a car standing on the company's line of road?

334 A. I tore it off the car at the north end of the right of way.

Q. Who instructed you to do that?

A. Nobody.

Q. Who gave you permission to do it?

A. No one.

Q. Who saw you do it?

A. I think the man who drove out with me from Evanston at that time.

Q. No one in the employ of the company?
A. No, sir; I think not.
Q. You simply found the cars standing there and this tag on the car and you tore it off?
A. Yes, sir; those are the facts.
Q. You say the tags had apparently been tore off the other cars?
A. Yes, sir; all the other cars except this.
Q. Did you tear them off?
A. No, sir; they had been torn off before I came there.
Q. You don't know by whom?
A. No, sir.
Q. Or whether any one was sent out by this complainant to tear them off?
A. No, sir.
Q. Or by the plaintiff's attorney?
A. I should presume not.
Q. Have you been out there since?
A. Yes, sir; a great many times.
Q. The road is constructed now, is it not, and properly graded?
A. It seems to me a pretty fair right of way. I live at Evanston and see it often.

335 Q. It would pass your inspection as railroad expert in its present condition, would it not?
A. No; I think not, as compared with other rights of way in the same vicinity.
Q. You think you would even now condemn it?
A. No, sir; I would not say I would.

EXHIBIT A.

The Wells & French Co., bridge and car builders, 146 Dearborn St., Chicago.

Shipped on C., M. & St. P. R. R., via car No. 51, for C., M. & St. P. R. R., at Chicago, Ill.
Date, Nov. 18, 1882.

THE WELLS & FRENCH CO.,
Consignors.

336 Testimony of Edwin Walker, a witness on behalf of complainant, taken before H. W. Bishop, master in chancery of said court, on Saturday, the sixth day of November, A. D. 1884.

Q. I will ask you if at one time — made some examination into the rights or claims of the complainant in this cause or A. D. Stickney.
A. I cannot say I made an examination. I think I at one time examined a contract that is probably referred to in the bill. My recollection is that it was a contract between Mr. Stickney or Stickney & Co. and Mr. Goudy. If you have a copy of the contract I can tell.

Q. Can you state when that was?

A. I can't fix the time. I should say, to the best of my recollection, it was after the commencement of this suit I examined that contract.

Q. Did you examine something in relation to the matter some little time before the commencement of the suit?

A. I did—that is, I made an examination of the records of the company for the purpose of finding out what the records show of the condition of the property; but that was some time before the bill was filed.

Q. Did not Mr. S. S. Merrill, manager of the Milwaukee & St. Paul road, request you to make some examination in regard to the claim of the complainant?

A. I cannot state that he made such a request. I had an interview with Mr. Merrill relative to this matter. My recollection
337 now is that first I wrote to Mr. Merrill about the matter *as* the suggestion of the parties, and I don't think Mr. Merrill requested me to make an examination of the title or the rights of the parties. He may have done so, however. I would not be positive about it.

Q. When was this you had this interview with Mr. Merrill?

A. I had an interview with Mr. Merrill and Mr. Mitchell, I should say, a year or two before this bill was filed; that was at Milwaukee. I had an interview with Mr. Merrill and Mr. Mitchell both in regard to the matter. My recollection is I went there twice more particularly to see Mr. Mitchell.

Q. Was it with reference to whether they should purchase the claim of the complainant?

A. Whether who should purchase it?

Q. Mr. Merrill or Mr. Mitchell.

A. It was more particularly with reference to whether it should be purchased at that time by parties in the interest of the Milwaukee & St. Paul Company.

Q. Wasn't this interview or one of those inverviews in February, 1882?

A. I have no means at all of fixing the date; it may have been not long prior to that date; I cannot state now. The interview I referred to was some time prior to that, because some months after I had this interview with Mr. Merrill and Mr. Mitchell Mr. Merrill advised me that he had received a letter from Mr. Hill rela-
338 tive to the same matter, and that he had answered that letter. I remember now that that occurred some time—I should say several months—after my interview with Mr. Mitchell and Mr. Merrill.

Q. Did Merrill send or show you the letter from Hill to him?

A. He did not. Mr. Merrill told me at my office about receiving the letter; that was some time after I went to Milwaukee. I never saw the correspondence at all.

Q. Was that before or after he had replied to the letter?

A. You mean the time he spoke to me?

Q. Yes, sir.

A. It was after he had replied.

Q. At the time you had the interview at Milwaukee, previous to this letter, did Mr. Merrill say that he had been requested by Mr. Hill to purchase this claim?

A. He never said anything about Mr. Hill; never mentioned his name in connection with the matter until the time he told me he had received either a letter from Hill or Hill dropped into his office, at Milwaukee, on his way home from the East to St. Paul, calling on him at Milwaukee, and spoke about this matter, and afterwards wrote it.

Q. This was sent to you by Merrill at the time of your interview at St. Paul?

A. No, sir.

Q. At a subsequent interview?

A. Long after.

339 Q. At the time of your interview at Milwaukee, when you had this talk with Mr. Merrill about this matter, what was the cause of the matter being talked over?

A. Which matter do you mean?

Q. The matter of the claims of Mr. Hill to this property.

A. It was not discussed at all; was not mentioned or referred to in my interview at Milwaukee or either interview.

Q. Did you not advise Mr. Merrill, in regard to his purchase, whether he had better purchase the claims of Hill to this property?

A. No, sir; I can state why I answer that in that way. When I first went to Milwaukee I went with Mr. Goudy, and this matter was discussed—the rights of the Chicago & Evanston, the charter and the rights of the company under the ordinance, the entrance that it had acquired into the city—and the whole matter was presented to Mr. Mitchell and Mr. Merrill, and they considered the matter; they gave no reply to it at all at that time.

Q. Did you state what time that was?

A. I could not give the time, but it was a long time before this; it was a long time before that letter. I could not fix the date, whether it was several months or whether it was a year. I have no means of stating. I have no means of refreshing my memory. I made no record of it. The matter was then presented to both of these gentlemen, and it is possible I had written to them about the matter before the appointment was made in Milwaukee, and

340 afterwards Mr. Mitchell advised me, either orally or by letter—I don't know which—that he would not advise the company and he would not himself make the purchase, and then the matter rested for some months. As it now occurs to me I had another interview shortly before, perhaps not very long before, that letter, and Mr. Mitchell gave the same answer to the proposition that he did at first; then Mr. Merrill told me he had a proposition from Mr. Hill to sell them some property—the same stock—turn over the entire matter to him.

Q. That was about when?

A. When he told me?

Q. Yes.

A. I would not say how long before the date of that letter; neither would I say that it was before the writing of that letter. Mr. Merrill told me that Hill—I think he said that Hill—called on him to negotiate the sale of this property, and afterwards he had written a letter proposing to sell it, and that he had proposed to sell it for less money than what other parties had offered it to the company for, and Mr. Mitchell would have nothing to do with it, and a letter had been written to Mr. Hill—of course I can't give the date, for I had interviews with Mr. Merrill whenever he came to Chicago.

Q. It is your impression it would be somewhere about the time of this letter?

A. No, sir; I could give no impression of the time. I should say it might be several months prior to that time or during the
341 winter, or might be after the writing of that letter that he had told me that he had had correspondence with Hill.

Q. It would be your best impression it was in the fall of 1881–'2?

A. It would be my best impression shortly after that date Mr. Merrill spoke to me about the letter that he had written to Hill, *that he had written to Hill*, but I could not state how long prior to that time it was when Mr. Merrill first spoke to me about it.

Mr. COLE: You are the attorney of the Chicago, Milwaukee & St. Paul?

A. I am the local attorney.

Q. You knew Mr. Merrill's handwriting?

A. Yes, sir.

Q. Please examine Complainant's Exhibit N, attached to the testimony taken in St. Paul, and state whether or not that is Mr. Merrill's handwriting.

A. I should think it was; that signature is his.

Mr. COLE: I desire to give notice to defendants' solicitor to produce the original of Complainant's Exhibit N, which is a letter from Hill to Merrill. We have here a letter-press copy.

Mr. ELA: I will ask you if you remember shortly before the filing of the bill in this case I called upon you and requested to be allowed to examine the books and records of the Chicago & Evanston Railroad Company to obtain information in regard to transactions of the directors for a few months preceding.

342 A. I remember your calling, but I can't fix the date. It was before the filing of the bill; I know that.

Q. State whether or not you refused to give me information or allowed me to make the examination.

A. I would not say I refused. I can only state the impression that I have of your calling upon me. Either you or somebody else called upon me and requested the privilege of examining the books of the Chicago & Evanston Railroad Company. I don't know whether at that time the books were in my possession or custody at all or not. I don't think they were. I know I said at one time to the party who called—whether it was you or somebody else I don't remember—that any party that had a right to examine the books could examine them and no party who had not the right could ex-

amine them with my consent or permission. At one time the books were under my control as attorney for the company. That was only for a short time. Whether they were in my possession at that time or not I don't remember. If you called and I declined to allow you to examine the books it was because you did not state at that time that you desired to examine as a stockholder nor stated or showed me you had any right to an examination of the books any more than any other attorney.

Q. I will ask you if you do not remember I came into your
343 office and stated Mr. Wadsworth, the secretary of the company, told me the record book was in your office, and that I asked you if I could be allowed to examine it, and you asked me if I was the attorney of or represented Mr. Hill or the parties who claimed this property and were threatening to commence suit and I told you I was, and you wanted to know if I wished to get information to use in that matter. I told you I thought we should, and that you told me to call again and in the meantime you wished to talk with Mr. Goudy. I did call again and you told me you had concluded not to give me the information; didn't care to furnish material for us to fight you with, or something to that effect.

A. I don't remember that; still, I think I can state with a good deal of certainty if you came to my office and stated you wanted to examine the books for the purpose of getting some information that would enable you to bring suit for Mr. Hill or any other person I should decline, or I probably said I could not permit you or anybody else to go fishing round those records to see if you could find any opportunity there of making an attack on us. I would naturally say so.

Q. You in fact refused to allow me an examination of the books?

A. If I refused to allow you to examine the books it was because you did not make any representation to me that would authorize an examination of the books; that you did not represent any
344 parties entitled to an inspection of the books.

Q. I was a director at that time, wasn't I?

A. If you were a director and asked me to examine them as a director permission was undoubtedly granted you; if you asked me to examine them as a mere attorney and permission was refused it was because you did not make a proper representation or a representation that would have entitled you to an examination.

Q. As a matter of fact, did I not say I wished to examine the books, and when you asked me if I should give information or wanted to obtain information for the purpose of communicating it to Hill you said you would not allow the examination?

A. I don't know whether you used that language or not. I could not state. I stated very fully if you stated you wanted it for the purpose of communicating it to somebody that was going into litigation with us I most likely refused.

Q. You refused to allow me to examine the books?

A. The request you made looked to me as if it was a request made for the examination of the books in a manner that would naturally bring a refusal. I thought you desired a refusal more than you did

an examination. That was a mere impression I had from the demand you made.

Q. As as matter of fact, you refused to allow me to examine them, didn't you?

345 A. I won't say that; I don't think you ever earnestly wanted to examine them.

Q. Did I ask to examine them, and did you say to me that I could not?

A. You did not in those words, and I did not answer you in those words. If I had supposed my recollection was to be tested in regard to the interview I should have had a stenographer to take it down.

Q. Do I understand you to say you did not refuse to allow me to examine the books?

A. You may understand me as saying I never refused you an examination of the books when you made the request as a stockholder or officer of the company.

Q. Did you, as a matter of fact, refuse at that time to allow me to examine the books?

A. I cannot state any further than what I have stated.

Q. You did not produce the books for my examination?

A. I don't think I did. I know very well the statute points out who shall have access to the books and the right to an examination. I know you did not bring yourself within the ruling in your statement to me.

Q. Is that Julius Woodworth a stockholder of the Chicago, Milwaukee & St. Paul?

A. I don't know.

Q. Or a director?

A. He is a director.

Q. Hugh T. Dickey?

346 A. I shall not undertake to give you the names of those directors from recollection, because I can get a list and make it a part of my examination. I do not mean to say I desire to withhold the information, but I would not undertake to be accurate. I don't know whether Judge Dickey is a director or not.

Q. Or stockholder?

A. I don't know.

Q. Has he been a director?

A. I don't remember whether he has or not. I should say that he had, because I have seen him once or twice in my office, about Milwaukee & St. Paul matters. I cannot state whether he has been an officer of that company or not.

Q. I will name them over: J. Mulbank, James Stillman, Jas. T. Woodworth, E. L. Frank, William Rockafellow, C. R. Chamberlain, and George Smith.

A. Millbank is dead.

Q. Was he a director?

A. He was at one time. I don't remember whether Stillman was a director at any time. Chamberlain I know was. Woodworth was a director at one time.

Q. Frank, Rockafellow, and Smith?

A. Smith never was a director, or has not been for years.

Q. Is he not a large stockholder?

A. That I don't know. I could not state who the stockholders of that company are.

Q. Rockafellow and Frank?

Q. Rockafellow, I think, is a director this year; he was last year. I don't remember whether Mr. Frank was or is.

347 Q. Chamberlain?

A. Chamberlain was a director; whether he is at present a director or not I don't know.

Q. I see by your answer filed in this case this clause: "And the defendants Edwin Walker, Harper, and Woodworth say each for himself that he is the holder of one share of stock in order to qualify him to act as director in the interests of the stockholders hereinbefore mentioned; that he has no other or further interest in said company or its stock; and the defendant Edwin Walker says for himself he was not a party to the contract of purchase made to Easton and Carey, but acted as attorney-at-law for them and the parties they represented and in no other way."

Q. I will ask you whether that is the fact.

A. Which fact?

Q. The facts which purport to be stated there.

A. They are all facts so far as I remember. When I say I acted as attorney for them I do not think I intend by that answer that I acted as attorney for them at the time they made the contract. I know I talked with Mr. Carey about it, but Mr. Carey is a lawyer himself and he did not need any legal advice, and since that time I have represented as attorney all the parties in interest, and they both talked with me about this matter at the time they

348 entered into the contract, but my relation to them is not strictly that of attorney—that is, the relation of attorney and client hardly existed at that time.

Mr. COLE: I understand you to say, so far as you acted at all in this transaction—the purchase of this property—it was not personal on your own individual right, but as attorney for Easton and the parties represented by them so far as you acted.

A. At the time the contract was made I did not know what parties would be interested in the contract. I represented no party as attorney at the time the contract was made. I was consulted in a friendly way both by Easton and also talked with Cary about it, but was scarcely attorney of either of those gentlemen at that time, and the other parties I didn't have anything to do with, because I did not know they would ever become interested in the matter. It is possible I might have known from information that Mr. Wadsworth was a person who had become interested in this matter.

Q. You had made some examination prior to that time of the records of the Chicago & Evanston Company?

A. Yes, sir.

Q. And whatever facts and information you had acquired did you communicate to Mr. Easton and Carey?

A. I don't know what communication I made to them. I think Mr. Cary examined the records of the company before the
349 contract was made.

Q. Mr. Cary was the general solicitor of the Milwaukee & St. Paul road?

A. Yes, sir.

Q. If you had acquired by reason of your examination prior to that time any important information in reference to the matter you would have been likely to have communicated it to Mr. Easton, would you not?

A. I think I would.

350 Testimony of John W. Ela, a witness on behalf of the complainant, taken before Henry W. Bishop, master in chancery of said court, on Saturday, the sixth day of November, A. D. 1884.

Q. Prior to the commencement of this suit and during the period involved in the controversy in this complaint set out you were one of the directors of the Chicago & Evanston railroad, were you not?

A. I understood I was. I don't know I was present at any election or had any special notice. I think I had some sort of an intimation I was a director.

Q. Your partner, Mr. Parker, was a director?

A. So I understood.

Q. The contracts in suit provide that Mr. Stickney shall have two directors and the balance shall be at the control of the other parties.

Q. State whether you and Mr. Parker were directors who represented Mr. Stickney's interest.

A. I was given to understand we were made directors for that purpose.

Q. Did you ever resign your directorship?

A. Not to my recollection.

Q. Were you such director at the time of the interview with Mr. Walker, which has been inquired about?

A. I had not resigned up to that time, to my recollection.

351 Testimony of William C. Goudy, a witness on behalf of the complainant, taken before Henry W. Bishop, master in chancery of said court, on Saturday, the sixth day of November, A. D. 1884.

Q. I show you Exhibit B, attached to the testimony taken in St. Paul, and will ask you whether that is your handwriting.

A. It is.

Q. And also Exhibit C?

A. That is my writing.

Q. Also telegram, Exhibit D; is that a telegram sent by you?

A. I sent a telegram of that date; whether that is an exact copy of it I don't know.

Q. Have you the original?
A. No; I have no original or copy of that.
Q. So far as you remember, is that a telegram you sent?
A. I should think it was substantially the same.
Q. State whether those are copies of the telegrams received by you.

(Witness shown Complainant's Exhibit E, consisting of copies of two telegrams sent from Stickney to witness.)

A. I received two telegrams. I should say they were substantially the same as contained in that copy, but I cannot be certain it is an exact copy. I have the originals.

Defendants' counsel are notified to produce the originals to be introduced in evidence.

352 Q. I show you Complainant's Exhibit B, being a letter from yourself dated September 1, 1881.
A. That is my writing and signature.
Q. I also show you Complainant's Exhibit G.
A. That is also my handwriting.
Q. I show you Complainant's Exhibit I, being two notices, one dated August 18, 1882, and the other September 4, 1882. Whose handwriting are those in?
A. The first is in the handwriting of Edwin Stewart, who was a clerk in my office; the body of the other is in the handwriting of Mr. Stewart, and the signature to it, "George Chandler, secretary," is in the handwriting of George Chandler.
Q. Were these notices sent out by your direction?
A. Yes, sir.
Q. I show you Complainant's Exhibit P, purporting to be a letter-press copy of a letter from Stickney to yourself. State whether that, so far as you recollect, is a copy of the letter.
A. I think it is, substantially. I have the original.

Counsel for defendant is notified to produce the original, to be introduced in evidence.

Q. State whether there was any dispute about the substantial correctness of Exhibits A, B, and C attached to the complaint.
353 A. I made a comparison of those papers with the originals and found some verbal differences. I think, perhaps, they were not very substantial, but there were some changes of words.

It is understood that the originals or duplicates of the three contracts attached as Exhibits A, B, and C to the bill may be considered in evidence, to be used on the hearing.

354 Testimony of William C. Goudy, a witness on behalf of the defendant, taken before Henry W. Bishop, master in chancery of said court, on Tuesday, the twenty-fifth day of November, A. D. 1884.

Int. 1. Please state your name, age, residence, and occupation.

A. William C. Goudy; residence, Cook county; lawyer by profession.
Q. Are you one of the parties to this proceeding?
A. I am a defendant.
Q. Are you acquainted with the parties to this litigation?
A. I don't remember all the names because they are numerous, but I am acquainted with the principal parties to it.
Q. Do you know of the Chicago & Evanston Railroad Company?
A. I do.
Q. For how long?
A. I have known of it since the act of incorporation of 1861.
Q. Have you ever held any official relation to that railroad company; and, if so, what?
A. In January, 1865, I was elected a director and continued to be a director until the 5th of September, 1882, and from the 5th of September, 1872, to the 5th of September, 1882, I was president.
Q. State what was the amount of the capital stock of that corporation.
355 A. $100,000, originally. It was increased to $300,000 at one time, and then decreased to $100,000; the decrease was in 1877.
Q. How was this stock held or represented?
A. Originally there was subscriptions made of stock and this was represented by issuing certificates to each subscriber which were changed from time to time as the rights were transferred, which recited no money had been paid, and that upon payment of the money the holder would be entitled to a certificate of stock. A correct copy of one of those certificates is set out in my answer in this case.
Q. Had any payments been made on the stock of the company or on these certificates during your official connection with the road?
A. No, sir.
Q. What interest, if any, did the North Chicago City railway have in these representatives of stock?
A. In 1865 the North Chicago City Railway Company purchased what purported to be a majority of these shares of stock which were unpaid. There was a dispute as to whether all of the stock purchased by them was the property of the parties who sold. A suit was commenced by Dr. John Evans, who claimed a portion of the stock and obtained an injunction which lasted until 1872; then the North Chicago City railway purchased some 200 more shares and
356 became the undisputed owner of about two-thirds of the shares and from that time the company controlled the franchise. From 1865 they had their representatives in the board of directors and elected them by the shares of stock claimed to be owned by them. As that company could not have or it was thought best not to have the stock in its own name, these certificates were held by different persons who had no personal or individual interest in the — merely as trustees for the North Chicago City railway. These certificates were shifted from time to time as that company directed. I held myself from the beginning some stock which was sometimes increased and sometimes decreased as changes were made, but it belonged to the North Chicago City Railway Company, who owned

all the shares held by different individuals connected with it, who merely acted as naked trustees.

Q. Was this transaction during the period the shares of capital stock amounted to $300,000?

A. The same situation of affairs existed from 1865 down to May 28, 1880, and at that time the sale was made of about 885 shares to me.

Q. Before 1880 did you render any services to or for the Chicago & Evanston Railroad Company; and, if so, what did you do, and under what circumstances?

A. I was practicing law, and was not only a director and president, but attended to the law business. The Evanston Company was a creature of litigation. I have mentioned the first
357 suit, which was instituted in 1865 and lasted to 1872. In 1874 other suits were commenced and injunctions issued, which continued until 1877, and there were controversies during the whole time of some nature or other, and as a lawyer I attended to that business. While I was president I also had general charge of such business as the company had to do, and for these services, however, as an attorney, I was paid by the North Chicago City Railway Company, but there was a great deal of work that I did that was not strictly professional service for a lawyer. I undertook to make some arrangements by which the road should be built and put in operation, and to that end the ordinance of 1872 was passed, and it was the intention then to proceed and build the road immediately, but it was followed directly after by the panic of 1873, which arrested all projects of that kind. Just before that and while it was expected the road would be built I purchased on the line of this road on the Lake Shore at Lakeview forty acres of land or an interest in it with a view of making some money out of that land by the construction of the road. That ultimately required the investment of quite a large sum of money, and for these reasons I was interested in having the road built or having it disposed of in some way that I could get compensation for my losses and outlays in the matter. The amount of service rendered during that time
358 would have been worth to me a good many thousands of dollars, and in addition to that the land which I purchased had depreciated a considerable amount below what I gave, and the only hope of getting the money back out of it was by the building of this road.

Q. Was this all prior to 1880?

A. Yes, sir.

Q. Did you have any interest in the stock, property, or debts of the Evanston Company prior to making the contract set out in the bill in this case?

A. None whatever of any kind. I merely held some stock as a representative of the North Chicago City Railway Company.

Q. In making those contracts or conducting the negotiations leading up to them did you act for or represent the North Chicago City Railway Company or any other corporation?

A. I did not. I represented myself only.

Q. In what relation does the defendant Turner stand to the North Chicago City Railway Company and did he at that time?

A. He was director and president and stockholder.

Q. Did he have anything to do with the negotiations either for himself or the railway company or any other person?

A. Nothing in the world.

Q. Did he have any connections or relations with A. B. Stickney & Co. in these matters?

A. He had not.

Q. What information, if any, did you give to Mr. Stickney
359 as to the certificates calling for stock and as to the control of the same or in regard to your contract for the same?

A. I stated to Mr. Stickney substantially the facts as to the corporation and its property, its rights of way and its stock, the ownership of the franchise and stock, and that while I was a purchaser from the company in order to become a seller to him that I could not deliver that stock or the control without paying the North Chicago City railway a sum of money—the sum I did not name to him—but otherwise I stated to him substantially all the facts in the matter. He had the impression, as I supposed, that the amount going to that company was the amount for which the note was given of $36,847; I believe it was. I did not disabuse him of that impression and did not mention the fact that I was only to pay $25,000.

Q. When and where and under what circumstances did you first become acquainted with Mr. A. B. Stickney?

A. Mr. Stickney came to my office in February, 1880; made some inquiries about the Evanston franchise and property and stated that he wished to ascertain what its condition was and the legal rights, and if satisfied about it he and some other parties would like to make a negotiation for it and a purchase of it. I submitted the facts to him and made a statement in writing, which he submitted to judge Beckwith for an opinion, and he gave him an opinion in regard to the company and its rights. This resulted in the making of
360 a contract, dated the 18th day of February, 1880. The contract is signed by A. B. Stickney, for himself, D. N. Sabin, and L. F. Hubbard, and by the Chicago & Evanston Railroad Company, by W. C. Goudy, president, a copy of which is hereto attached as Exhibit No. 1. I received about the 27th of March, 1880, a communication from Stickney, a copy of which I attach to my deposition as Exhibit No. 2.

Counsel for complainants objects to Exhibit No. 1 as immaterial and irrelevant.

On the 13th of April Mr. Stickney came to Chicago and into my office, and he said that he had now come to talk business; that the other matter had fallen through, but there were new parties who were willing to go into this matter with him who did not care to have their names exposed. He stated then, as he had before, that he had not himself the pecuniary ability to build the road or to carry out the proposed enterprise, but that the persons who were back of him had the means to do so, and, in order to satisfy me that they

were responsible and were able to perform the contract, or that he by their aid would be able to perform the contract, he suggested this arrangement, namely, that a letter should be deposited with the cashier of the First National Bank of St. Paul by which they should obligate themselves to perform Stickney's contract or that he should perform, this letter and these names to be kept by the cashier
361 until it became necessary for me to have them. We had some talk at the same time about the terms, not varying very much from and being substantially the same as had been contained in the contracts of February 18th. He fixed some time in May which he would return, and meantime I would correspond with the cashier of the Nat. Bank of St. Paul and satisfy myself of the parties back of him. I left immediately after that conversation for Washington, and on the 15th of April, 1880, I wrote from Washington a letter to the cashier of the First Nat. Bank of St. Paul, a copy of which I attach to my deposition as Exhibit No. 3. I received before the first of May an answer to that letter, which I attach to my deposition as Exhibit No. 4. Mr. Stickney came to Chicago about the 18th of May and remained here for ten days. Taking the contract of February 18th as a basis, he made himself memoranda and drafts of a contract and brought them to my office and submitted them to me. They were talked over, changes were made, then he would go back to his hotel, and the next day he would come back with new suggestions or new drafts. Copies were made of these at different times by the clerks in my office, and he went over them with Mr. Chandler and occupied pretty much the whole of the ten days in figuring out drafts of contract, and finally it resulted in the adoption and execution of the contract of May 28, 1880, referred to in the bill in this case.

362 Q. The negotiations which you have referred to were the same that resulted in these contracts of May 28, 1880?

A. Yes, sir.

Q. Who were the persons constituting the firm of A. B. Stickney & Co., with whom the contracts were made? State all you know about that, and if they confirmed the contracts that were made, and if they ever authorized any changes or extensions of them.

A. I never learned who those persons were until I received the information by a letter of Oct. 9, 1883, from Henry P. Upham, who had been in 1880 cashier of the First Nat'l Bank of St. Paul, but was then president. I attach a copy of that letter to my depositions as Ex. No. 5. I learned from that letter that the parties who signed the document left with him and who formed the company were James J. Hill, of St. Paul, and R. B. Angus, of Montreal.

Counsel for complainant objects to Exhibit No. 5 as being hearsay.

The paper signed by them reads: "We, the undersigned, hereby guaranty the ability of A. B. Stickney to carry out and perform certain contracts with the Chicago & Evanston Railroad Company mentioned in a letter from W. C. Goudy, dated Washington, April 15th, 1880." The main contract was not in fact made with the Evanston Company, but was made with me and was not within

the strict letter of this authority. Neither James J. Hill nor R. B. Angus ever did confirm the contract, within my knowledge;
263 but, on the contrary, Mr. Stickney told me in 1882 that they had not, and that he had been unable to get them positively to approve of what had been done or to say with certainty that they would build the road, and in the conversation on the subject had in St. Paul in Aug., 1882, or in Chicago in June of that year, I am not certain which, he stated to me that he was greatly relieved when he received a message from Lowry that I claimed the contract was ended, because he had never to that time been able to get Hill to say that he would protect him in the contract. I never heard from Stickney who was back of him as representing the company until the 16th of June, 1882. The only information I had about who they were before that came from other persons.

Counsel for complainants objects to that portion of the answer giving the statements of Stickney to witness.

Neither Hill nor Angus ever authorized any extensions to be made of the contract or the time mentioned therein, to my knowledge. I never was informed that they had.

Q. Who was Mr. Lowry, whom you have mentioned in the last preceding answer?

A. Mr. Lowry was a resident of Minneapolis, a lawyer by profession, and, like some others, had got into the horse-railroad business up there. He called on me on the 4th of May, 1882, and stated that he had been sent there by Mr. Stickney, and he had met with
364 him at the same time the duplicate original contract of Stickney of the 28th of May, 1880; that Stickney had offered to sell him the contract at $75,000, or $20,000 more than I was to receive, and he wished before concluding any arrangement to ascertain the situation of the property and the rights under the contract. I informed Mr. Lowry at that time Mr. Stickney had nothing to sell; that the contract had been ended long ago by default on his part, and he then stated to me that he would telegraph to the effect back to Stickney.

Q. Who was present during your negotiations with Mr. Stickney or when the contracts were prepared and executed?

A. There was no person present during those negotiations except Stickney and myself, and during a considerable part of them—I don't know but all—Mr. Chandler; besides, there were some of the clerks in my office, who were engaged in doing the clerical work. There were no other persons.

Q. By whom was the defendant De Koven suggested as a trustee to hold the papers in escrow, and why was he selected?

A. He was suggested by Mr. Voluntine C. Turner, president of the North Chicago City Railway Co. Mr. Turner was not to part with control of the stock or the right of his company in any way to me until he got his money, and this arrangement was made, which is shown by the contract of that date, May 28, 1880, by which the certificates of stock and note were to remain in escrow until the

money was paid to the North Chicago City R'y Co., and Mr.
365 Turner had the selection and did select Mr. De Koven, who was cashier of the bank of that company, as the custodian of the certificates of stock and note, and also there was put with them an assignment made by myself of one of the contracts made at the same date. I suggested Mr. De Koven's name to Stickney after he had been selected by Turner and told him why these things had been put in escrow, not only as between him and me, but also for the protection of the North Chi. City R'y Co.

Q. What was left with Mr. De Koven and by whom? And state what it was.

A. A copy of the contract between Stickney & Co. and myself; also attached thereto a copy of the contract of Stickney & Co. with the Evanston Railroad Co. and a copy of the Evanston Railroad Company with me, being the same contracts mentioned in the bill in this case; also a certificate of stock or for shares of stock, on which nothing had been paid, for 875 shares, and promissory note for $36,847.78, executed by the Evanston Company to the North Chicago City R'y Co., and an assignment made by me to De Koven, as trustee, of a contract, or right to the compensation, rather, on a contract, made on that date between the company and me for procuring the right of way, by which I was to get $25,000. Mr. Stickney and myself went personally to the Merchants' Nat. Bank and stated the facts to Mr. De Koven and handed him these papers.
There was also a proxy to me authorizing me to vote the 875
366 shares in pursuance of the contract which Mr. De Koven at that time signed and delivered to me. There was a receipt that had been prepared at the end of the contract by which Mr. De Koven agreed to act as trustee and acknowledged the receipt of the documents. He declined to sign that; said he had not time to read the papers over, and he never would sign any paper that he had not fully read or did not understand what it was. Mr. Stickney replied he was willing to leave the papers without any receipt, and they were so left. I never knew he had signed any special receipt or acknowledgment until De Koven surrendered these papers, or rather after he surrendered the papers in 1882; I saw his name was signed to that document—when he signed it I don't know; he did not sign it when we left the papers there.

Q. Was that receipt found amongst the papers, and was it ever delivered by De Koven to anybody until the papers were finally delivered up?

A. No, sir; he retained the papers and retained this receipt. There were triplicates of these contracts—one left with De Koven, one taken by Stickney, and the other kept by me.

Q. Was there any paper between you and the North Chicago City railway left also in Chicago with De Koven?

A. No; there was a contract made by me on the same day with the North Chicago City R'y Company, but my recollection is
367 that I kept a copy of it and Mr. Turner kept a copy of it; but none was left with De Koven.

Q. Did Mr. De Koven, at that time or any other time, to your

the strict letter of this authority. Neither James J. Hill nor R. B. Angus ever did confirm the contract, within my knowledge;
263 but, on the contrary, Mr. Stickney told me in 1882 that they had not, and that he had been unable to get them positively to approve of what had been done or to say with certainty that they would build the road, and in the conversation on the subject had in St. Paul in Aug., 1882, or in Chicago in June of that year, I am not certain which, he stated to me that he was greatly relieved when he received a message from Lowry that I claimed the contract was ended, because he had never to that time been able to get Hill to say that he would protect him in the contract. I never heard from Stickney who was back of him as representing the company until the 16th of June, 1882. The only information I had about who they were before that came from other persons.

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365 Turner had the selection and did select Mr. De Koven, who was cashier of the bank of that company, as the custodian of the certificates of stock and note, and also there was put with them an assignment made by myself of one of the contracts made at the same date. I suggested Mr. De Koven's name to Stickney after he had been selected by Turner and told him why these things had been put in escrow, not only as between him and me, but also for the protection of the North Chi. City R'y Co.

Q. What was left with Mr. De Koven and by whom? And state what it was.

A. A copy of the contract between Stickney & Co. and myself; also attached thereto a copy of the contract of Stickney & Co. with the Evanston Railroad Co. and a copy of the Evanston Railroad Company with me, being the same contracts mentioned in the bill in this case; also a certificate of stock or for shares of stock, on which nothing had been paid, for 875 shares, and promissory note for $36,847.78, executed by the Evanston Company to the North Chicago City R'y Co., and an assignment made by me to De Koven, as trustee, of a contract, or right to the compensation, rather, on a contract, made on that date between the company and me for procuring the right of way, by which I was to get $25,000. Mr. Stickney and myself went personally to the Merchants' Nat. Bank and stated the facts to Mr. De Koven and handed him these papers.

There was also a proxy to me authorizing me to vote the 875
366 shares in pursuance of the contract which Mr. De Koven at that time signed and delivered to me. There was a receipt that had been prepared at the end of the contract by which Mr. De Koven agreed to act as trustee and acknowledged the receipt of the documents. He declined to sign that; said he had not time to read the papers over, and he never would sign any paper that he had not fully read or did not understand what it was. Mr. Stickney replied he was willing to leave the papers without any receipt, and they were so left. I never knew he had signed any special receipt or acknowledgment until De Koven surrendered these papers, or rather after he surrendered the papers in 1882; I saw his name was signed to that document—when he signed it I don't know; he did not sign it when we left the papers there.

Q. Was that receipt found amongst the papers, and was it ever delivered by De Koven to anybody until the papers were finally delivered up?

A. No, sir; he retained the papers and retained this receipt. There were triplicates of these contracts—one left with De Koven, one taken by Stickney, and the other kept by me.

Q. Was there any paper between you and the North Chicago City railway left also in Chicago with De Koven?

A. No; there was a contract made by me on the same day with the North Chicago City R'y Company, but my recollection is
367 that I kept a copy of it and Mr. Turner kept a copy of it; but none was left with De Koven.

Q. Did Mr. De Koven, at that time or any other time, to your

knowledge, have any interest in the matter except merely as holder of the papers and as trustee?

A. He had none whatever; knew nothing about it except what Stickney and I told him when we left the contract with him; he had no personal interest in it of any sort or kind.

Q. Did you ever act for him or have any authority to act for him in any of these matters afterwards?

A. I had no authority and never did act for him and never represented I acted for him; I never talked with De Koven after the time the papers were left about the matter until May, 1882, when I met him in New York and had a conversation with him on the subject.

Q. Was the defendant Turner present during any of these negotiations or when the contracts were read over?

A. He was not; he was not present at all during any of the negotiations, and after drafts were prepared I sent for Mr. Turner and he came over to my office and I read them over to him—Mr. Chandler only being present—the object being to inform him as to how his company would be secured as to the $25,000 going to the company; but Stickney was not present and did not see Mr. Turner but on one occasion within my memory. Turner was
368 in my office, my own private room, on one day during that time when Stickney walked into the room. I introduced Mr. Stickney to defendant and stated that Stickney was the man I was negotiating with about the Evanston road, and that Mr. Turner was president of the North Chicago City R'y Co. They had some commonplaces for a minute perhaps and Mr. Turner went out of the room.

Q. Did Mr. Turner come into your office on any matter connected with this negotiation at that time?

A. I think not.

Q. What were your relations there to the North Chicago City R'y Co.?

A. I was doing its law business, attorney for it.

Q. What property or right of way did the Chicago & Evanston R. R. Co. own at the time these contracts were made?

A. The Evanston Co. had a charter by the special act of 1861, and there was an ordinance by the common council of the city of Chicago passed August 17, 1864—what rights existed under it was a matter of some difference of opinion—and an ordinance passed in 1872, under which about one mile and a half of track had been laid in 1874 on Hawthorne Ave. jointly with the Chicago & Pacific Railroad Co. and tracks which had been laid at the same time from the northern junction of the track just mentioned to the city limits. The
369 latter tracks separate from the Pacific, never having been used for the running of trains. The joint track has been used from the time it had been laid for the running of trains for the Chicago & Pacific under the agreement with the Chicago & Evanston to render to it a fair rent.

Q. Besides the items mentioned, did the company own at that time any tangible property or any equipment?

A. No, sir.

Q. In what way and how was the right of way from the city limits to the Calvary cemetery to be paid for?

A. The expectation was to pay for it out of the sum of $20,000 that was paid to me on the 28th of May, 1880, when the contracts were made. That was the object of furnishing the money.

Q. By whom was the money then paid to you?

A. Stickney gave me a check of his own on one of the banks in St. Paul. I deposited it in a bank in Chicago and it was collected.

Q. After the date of these contracts what did you do by way of performance on your part?

A. The first thing that was done was to procure a certificate for 875 shares of stock which was issued, certificate No. 27, dated May 28, 1880, to John De Koven, trustee. The way in which that certificate was made up was this: The shares of stock stood on the books
370 in my own name, in J. C. Turner's name, and in Ebenezer Buckingham's, and then there were a small number of shares in one or two other persons. Those certificates they surrendered and a new certificate was issued representing that amount so surrendered to De Koven. These persons who surrendered the certificates out of which this was made were holding the shares as trustees for the North Chicago City R'y Co., and none of them had any individual or personal interest in them.

There was a debt due at that time from the Evanston Railroad Company to the North Chicago City R'y Co. for $36,847.78, which stood in an open account on their books and arose from moneys advanced by that company for the use of the Evanston. In order to carry out the arrangement a promissory note for that sum was executed by the Evanston Company to the North Chicago City R'y Co. I also prepared and made an assignment to John De Koven, as trustee, of all my interest in a contract of that date for procuring right of way, and these three documents were left with Mr. De Koven on the day of their date. At the same time Mr. De Koven executed and delivered to me a proxy authorizing me to vote 875 shares of stock at all the stockholders' meetings. Immediately thereafter, at the request of Stickney, I caused the two vacancies in the board of directors—there being seven places—to be filled by John W. Ela and Thomas Parker, who were selected by him as his representa-
371 tives to act in the board. I settled up the account between the Evanston Company and the Chicago & Pacific Company growing out of the construction of their joint track and other matters between them and finally reached a conclusion about that matter, so that a paper on the subject, showing the settlement, was executed on July 6th, 1880.

As to the right of way, I proceeded immediately to examine two or three different routes; had plates made showing the lines and curves over the ground at different times; saw various property-owners, consulted with them about the location and the damages which would be caused, and endeavored to procure, as far as possible, gifts of the right of way, as had been intended. All this was done before the 15th of July, 1880; on that date I left the city on a

vacation and went east and did not return until the first week in September. While I was absent I received a telegram from Mr. Chandler on the 19th of July asking if an agreement might be made with the St. Paul Company for a connection of the track. I answered that by a dispatch, which I attach to my deposition as Exhibit No. 6.

Objected to as immaterial and irrelevant.

I also attach a copy of dispatch of July 21, 1880, from Geo. Chandler to A. B. Stickney and an answer to that dispatch from Stickney, dated July 22, 1880, as Exhibit No. 7.

No agreement was actually made, however, in regard to
372 such connection at that time. After returning to Chicago, in September, I was occupied from that time up until election a considerable part of the time in trying to elect a Democratic President and did not give much attention to the Evanston business.

After the election, owing to the neglect of my law business, I had an unusual amount to do, and did not give any attention to the Evanston affair before the first of the following January, and nothing was done. The first I ever heard of Stickney after this dispatch in July, either by letter or by personal interview, was by a letter dated Dec. 26, 1880, and immediately thereafter a second letter, dated Jan'y 3d, 1881, copies of which I attach as Exhibits 8 and 9. On the 5th of January, 1881, I answered both these letters, and a copy of my latter is attached to Stickney's deposition as Exhibit B. About the first of January I went to work again to procure the right of way, and spent a large proportion of my time about it from that time up to the first of June, and made arrangements for a considerable part of the right of way. Many of these arrangements were in parole, and for one reason or another the deeds for the right of way were not actually executed, but in other cases they were. The 1st of June came around and I did not have the right of way procured. I continued to work for a considerable time during June, up to the
1st of July, with a like result. So much I did by way of per-
373 forming under the contract up to the time a default was made, as I understand it, by Stickney under the contract in not paying $25,000.

Q. You have mentioned in your deposition George Chandler. State what his relations were to you at that time.

A. Mr. Chandler had been a former partner of mine and still occupied the office with me, as he does now, and he also held one share of the stock in the Evanston Company to qualify him for directorship, and was a director, and also held the office of secretary of the Evanston Company. He had no individual or personal interest in it. The share of stock he held belonged to the North Chicago City Railway Co. Whenever I speak of stock I mean the certificates entitling the holder to stock on paying up the money for them. They were all alike.

Q. What, if anything, did Stickney do by way of performance on his part?

A. On the day of the contract he paid $20,000. He did nothing else.

Q. What correspondence or conversations did you ever have with Mr. Stickney, after the making of those contracts before July, 1881?

A. I have already stated that I did not see Stickney or have any correspondence with him or communications except these telegrams in July, through Mr. Chandler, the letter of Dec. 26, 1880, the letter of Jan'y 3, 1881, which were answered by a letter of Jan'y 5,
374 1881. The first time I saw Stickney personally after the contracts were made was about the 14th of February, 1881. At that time he was en route to New York or some other Eastern point, and called at my office; he also called on the 22d of Feb'y, 1881, on his return from the East. I cannot undertake to repeat the language of the conversation that occurred nor all that was said on those two visits. The main point that I have a recollection about was this: Stickney then and before had manifested a nervousness in regard to the affair of the tracks which had to be made on Southport Ave. There had been some riots there before and he was apprehensive there would be riots there again. He stated that he had been in some disturbance of that sort and he never wanted to be in another. When he first called, about the 14th, he said he had noticed in the newspaper that a man by the name of Stewart had recently been engaged in putting down some tracks for the Western Indiana in this city, in which he had successfully met a formidable riot and got the tracks down and exhibited great coolness and skill. He said that was the sort of man he wanted, and wished me to see if I could find him and secure his services to do this work on Southport avenue. I stated to him that I would endeavor to do so. He said he would stop as he came back and get an answer about that matter. He did stop when he came back, and meanwhile I had been to
375 Mr. Brown, president of the Western Indiana, and asked him where Stewart was and got his consent for the employment of Stewart to do this work. Mr. Chandler, at my request, hunted up Stewart, and he came into the office and agreed that he would do the job when we got to it. When Stickney returned he was informed that we had found Stewart, and that he would put that track down, at which he seemed greatly relieved. Just before he came down from St. Paul into the office, it being then near the middle of February, the question rose in my mind as to how long a time I had left to comply with the contract in getting the right of way, and I got the contracts and looked them over with Mr. Chandler and then ascertained the fact, that I had partially forgotten, that I had until the 1st of June, 1881, by the contract to complete the right of way. I was relieved at once and thought there was no sort of difficulty about my being able to complete the right of way before that time. I was then confident I could get it done by the middle of April or the 1st of May. When Stickney called I knew that fact. I believed that I had no need of any extended time in order to finish the work. I stated to him at the time, particularly at this conversation on the 22d, the last time he was there, I had had great difficulty in getting the right of way, much more than I had expected, and he replied that it was no more than

he expected; that he had had some experience of his own in
376 procuring right of way. I told him it cost a good deal more money than I had any idea about, and was to cost more, but I told him I expected to be able to complete my work and get all the right of way within a few weeks from that time, as the fact was. The next time I saw Stickney after that, personally, was Sept. 27, 1881. I did not see him from the 22d of February until the 27th of September, 1881; during that time, however, there was some communication. I wrote to him a letter dated May 2, 1881, a copy of which is attached to Stickney's deposition as Ex. C. I received an answer dated May 14, 1881, a copy of which I attach to my deposition as Ex. No. 10.

Q. Did you, except on the occasions you have mentioned, in February, 1881, see Mr. Stickney at any time between May 28, 1880, and July 1, 1881?

A. I did not. If I did I have not the slightest recollection of it, and I am quite sure I did not.

Q. Where were you on the 13th of April, 1881?

A. On that day I was in Haverhill, Mass., making a visit to Mr. Hale, who owned land for about three-quarters of a mile through which this road ran. I arranged with him on that day to get the right of way for that three-quarters of a mile. I had been for about a week in Worcester, Mass., and run up to Haverhill on the 13th of
April, 1881. When I returned home I was informed by Mr.
377 Chandler that Mr. Stickney had been here and seen him during my absence.

Q. What correspondence or conversation did you have with Mr. Stickney after July 1, 1881, and before Aug. 8, 1882?

A. I did not see Stickney personally after the 1st of July, 1881, until the 27th day of September of that year; but on the 26th of Aug., 1881, I received a telegram, a copy of which is attached to my deposition as Exhibit 11. On the next day I answered that despatch, a copy of which is attached to Stickney's deposition as Exhibit D. On the 29th of the same month Stickney telegraphed to me, a copy of which I attach to my deposition as Exhibit No. 12. I did not answer it by wire. On the 1st of September I wrote to Stickney, and a copy of the letter is attached to Stickney's deposition as Exhibit F. I received no answer and telegraphed to St. Paul to two or three persons there to find out where he was, and on the 14th of September wrote a second letter, a copy of which is attached to Stickney's deposition as Exhibit G. I received no answer to either of these letters by mail or by wire. On the 27th of Sept., 1881, Stickney called at my office in Chicago. He remained in Chicago; so that his last call on me was the 30th of that month. I saw him several times during that interval. The main subject of the conversation, as I recollect it, was in regard to the
subject-matter of these letters, which was the giving permission
378 to the St. Paul Co. to relay some 1,500 feet of track on Hawthorne Ave. and to have a joint use of it with the Evanston Co. I urged to Stickney that such an arrangement would be a good one to make for the Evanston. He said that he wanted to make

some money out of it and was of the opinion that the St. Paul would give a considerable sum to it. During that time I received from him a note, without date, written from the Grand Pacific Hotel, a copy of which I attach to my deposition as Exhibit No. 13. He thought that the privilege asked by the St. Paul was worth a large sum of money and named some considerable amount. I see that Mr. Stickney says that it was $40,000, and I think it was about that amount. I did not go to see Mr. Atkins, as he suggested in that note, to sound him, because I thought it was a preposterous idea, expecting the St. Paul Co. to give $40,000 for that privilege, and nothing further was done about it. I insisted then that the road must be completed and put in order inside of the city limits during that fall, and stated to him, as I had before written to him, that I had grants of the right of way which would expire unless the road was completed and in operation by the 1st of July, 1882, and if the work in the city was deferred to the spring, why there would be no probability that those conditions could be made and the right of way would be lost,
379 and that it was probable we would meet with injunctions and obstructions in repairing the track in the city occupying Southport Ave., and the only way to meet that was to finish the road during that fall in the city. I told him that if an arrangement could be made with the St. Paul Company to put down the track for about the 1,500 feet that it wished to use and at the same time contract with them to put down the balance of the track in the city, which would be about as much more, that it would be an easy way to meet that difficulty, and then the road could be completed in the spring, before the 1st of July, outside of the city. We talked some about damages that would probably have to be paid to abutting property-owners on Southport Ave.; also talked about the conditions that might be imposed upon the road in getting the right of way. Some of the property-owners had desired a condition that a certain number of trains should be run per day; some of them wanted to have rates of fare fixed, and these were matters we talked about. We also talked considerably about what was known as the St. Paul & Portage road, which was a paper road in the hands of some parties who were represented in the city by Mr. Barnes. Stickney said he wanted to get the control of that charter so as to build a road from Evanston, the terminus of the Evanston line, on or through Wisconsin. I had had some correspondence with him about it in May. I visited Mr. Barnes at the time he was there and talked with him and reported the
380 result to Stickney. During that time also he asked me for a certificate representing the shares which had been owned by Haskins, amounting to 110⅔ shares. When the contracts were made in 1880 that stock was not in the control of the North Chicago City railway, but was held by Edwin Haskins, and he requested me to get it up if I could, and I agreed to do so. On the 3d of July, 1880, I purchased from Haskins those shares, and he assigned the certificates in blank to me. I paid them $250, my own money, which stood in that way until the visit of Stickney in September, 1881, and on the 30th of that month he called my attention

to it and asked me about it. I told him I had the certificate. He said he would like to have it. I accordingly showed him the certificate, and he wanted it surrendered and one issued to himself, which was done, and he gave me a check for the $250, which reimbursed me for what I had advanced in 1880. That certificate, which was issued to him on the 30th of September, 1881, is shown by a copy attached to Hill's deposition as Exhibit O.

Q. Is that the same one you have before referred to or the contents, the general form, of all those certificates?

A. That is not the one I have referred to, but this is the form of all the certificates. Stickney went away without any definite arrangement being made as to the construction of the tracks in
381 the city that fall or at any other time, requesting me to try to make this arrangement with the St. Paul people, to have them go to work and get a large sum of money—about $40,000—out of them.

I did not pursue the negotiations, and Mr. Atkins, as superintendent, never spoke to me about it afterwards. I did not see Stickney or hear from him after that time until the 19th of December, 1881, when he came into my office. I believe I had learned from Chandler that he called in the office the day before, but it was on the 19th I saw him. We had some conversation at that time about the matter. I told him at that time that I was unwilling to go on under the contract; that the right of way was not then procured; that the difficulty of obtaining it had been increasing all the time; that the price had raised, and it was going to take a good deal more money than the amount he had expected to get it for when the contract was made, and if anything further was done there must be a new arrangement made by which a larger sum of money could be paid for the right of way. He stated to me in the course of the conversation substantially this: "I got out those contracts the other day and read them over, and I saw the darned thing had run out," which was his exact language; and he says, Now, I would like for you to write me a letter that I can show to my people up at St. Paul and give us a chance to go on with it. I told him
that it would be impossible to do so unless some modification
382 for changes or increased compensation was made; that it had been a hard contract, and I had met with unexpected difficulties, and that I must have more money about it. His language then was, "Well, there is nothing mean about me, and I am going to do just what is right about this thing. Now," he says, "I have resigned my position as manager of the Canadian Pacific, to take effect the 1st of Jan'y, and I will come down here immediately, and I will spend the most of the month of Jan'y here, and I believe there is money in this franchise, and you and I will get together and see what we can make out of it. I think we can make some money for you and make some money for me." The conversation was not very long, and that, perhaps, covered the substantial point in the talk. He went away, and I didn't see him from that time until the 16th of June, 1882.

Immediately after we had this conversation on the 19th of De-

cember—and, according to a memorandum I have, I think it was on the 23d of that month—Mr. Edwin Walker inquired of me if I had still the control of the Evanston road or if it was for sale. I made some reply to him, and he then told me it had been offered to Mr. Merrill for the St. Paul people by Hill, and either then or in a subsequent conversation with Mr. Walker or Mr. Merrill I learned
that Hill had asked $75,000 for it. I replied to Mr. Walker
383 that Stickney and his associates did not intend to build that road as they had agreed, and were trying to speculate on my contract and make money out of it; that I thought the St. Paul had better deal directly with me, and that Stickney's interest had ended by default, and that he had nothing to sell, and if the St. Paul people wanted to negotiate seriously for it they had better deal with me. Stickney did not come in January, as he promised, and I concluded from those facts that the whole matter was done, and it was useless to expect to make any new arrangement with Stickney or his friends or to look to them to do anything whatever about the matter. During January I had a conference with Mr. Merrill about it. I am not sure whether I saw Mr. Mitchell in that month, but I think not. I think it was later. In regard to the disposition of the matter to them it resulted in their declining to have anything to do with it. Mr. Merrill said Mr. Mitchell was opposed to it, and they did not care to enter into the enterprise at all. I then proceeded to look up other parties whom I might induce to go into the enterprise and build that road. I spent a great deal of time from that time on down to the time I did make arrangement, in August of that year; dealt with different parties about it; went to New York three or four times. On the 4th of May, after Lowry had called on me and had telegraphed to Stickney, I received a letter from
him which was registered and which was dated May 29,
384 1882, a copy of which I attach to my deposition as Exhibit 13. I answered this letter on June 5, 1882, a copy of which I attach to my deposition as Exhibit 14. On the 16th of June, 1882, Stickney was in Chicago, and I had an interview with him at the Grand Pacific Hotel. I don't remember how the conversation commenced, but he had been previously advised that I claimed the contract to be ended and forfeited, and that was the subject-matter of the conversation. I offered him at the time $7,500 to procure a relinquishment of all claims for damages or of money or a cancellation of the contract. I stated to him at the time that I was under no legal liability whatever to pay any money; that, although I had received the $20,000, it was paid to me for the purpose of placing me in funds to procure the right of way; that I had gone in in good faith and endeavored to get the right of way, and in doing so had expended the greater share of the money; that I desired to have no misunderstanding and no litigation, and that I was also willing to do what was equitable and fair whether I was legally bound or not; that I had spent most of this money in the way it was intended to be spent, but I had some of it left, and in order to be thoroughly fair about it and avoid litigation and have no trouble or feeling about it I was willing to pay $7,500. He asked me whether

they could not be allowed to go on now and build that road if
385 they would pay an additional sum of money so as to procure the right of way. I told him, "No; that I had not any further control of the matter; that the certificate of stock, the note, and the assignment, which were left with De Koven, had been claimed by Mr. Turner as president of the North Chicago City Railway Company, and Mr. De Koven had delivered them to him; that they were out of my control, and that it was impossible for me to make any arrangement about it even if I was disposed to otherwise." He said that he did not think that Hill, whose name he mentioned at that time, would be willing to pay any more money whatever, but would insist that the contract was still in force and that they had a right to proceed and build the road, and that I was still bound to procure the right of way. I denied that proposition and told him I took another view of that entirely; at any rate, even if he was correct, that he could not go on and build the road, because I had lost power to deliver that stock to him or cause it to be delivered; that the only question there was, was whether I was liable on the contract for the $20,000 or any part of it. I claimed that I was not legally liable, but repeated my proposition. He stated that he could not decide the matter, but that he would submit the proposition to Hill and write me and give me an answer about it. In that conversation he stated to me that, so far as he knew, Hill was the only person who was interested in the matter back
386 of him; that he was the only man he knew in the premises, and if there was anybody else it was unknown to him. That was the first time Hill's name had ever been mentioned to me by Stickney. I had heard, however, of Hill's offer to sell it to the St. Paul people, through Walker, about the last of December preceding, and the only other information I ever had about Hill's having anything to do with it was derived in this way: Stickney was here, and, according to my recollection, it was in his visit in September, 1881, in talking about some of his propositions about the St. Paul people, he stated to me that his friends were in the city at the Pacific Hotel, and that he would have to consult with them. I had had some curiosity as to who the persons back of him were, and at that time I had no suspicions who they were. Immediately after he left the office I walked over to the Pacific Hotel and looked at the register. I found there the names James J. Hill and R. B. Angus and Mr. Stephens, whose first name I don't recollect, but who was president, I think, of the Manitoba road at that time. As they were from the St. Paul region and interested in railroads up there, I guessed they were perhaps Stickney's friends, and I saw no other persons I could imagine he could have occasion to talk with, but it was a mere guess; I had no information. I didn't see Stickney after the 16th of June until I met him in St. Paul, I think, on the 15th of Aug., 1882.

387 Q. What were the circumstances of the parties on the 27th of August, 1881, and during September of that year?

A. As I have already stated, the right of way was not procured at that time; no money had been paid to me on the contract except

the first payment of $20,000; no efforts had been made to pay any. As I had not heard from Stickney since the last letter of May 14 in any way and the time had expired, I supposed Stickney had abandoned all idea of going on with the contract, paying any money, or doing any work, for the same reason that I had worked at procuring this right of way before I had made the contract with Stickney, and in addition I had already invested a good deal more work and labor in it, and, the same motives existing for getting the railroad built, I had proceeded after the 1st of July trying to get the right of way and make inquiries for any persons I thought might be induced to build this road. When I received the dispatch of August 26th from Stickney I was very much surprised. I had then no assurance in any way I could induce any other person to take hold of the enterprise. I was willing then Stickney and his associates should go on with this contract and build the road on certain conditions, and one was that they should build in the city—

Objected to.

—during the fall and complete the road in the spring,
388 before the 1st of July, as I telegraphed to him and wrote to him; the other was which I expressed to him personally, here in Chicago, in September, that something should be done to meet the deficiency that I had incurred in my contract to pay for the right of way, as I have already stated. Mr. Stickney went away without any definite arrangement being made for a renewal of the contract for building the road either that fall or the next spring, leaving me in the somewhat indefinite plan of getting a road built in the city if I could by a trade with the St. Paul Company, and had Mr. Stickney complied with those conditions I undoubtedly would have, so far as I was concerned, extended the balance of the contract, and it would have been renewed upon those terms. They never were performed, and Stickney paid less attention afterwards to it than he did before. When he came in December there was a distinct understanding then that it had expired and that some new arrangement must be made, and he promised to come back and try to do something the next month, which he did not do, and in the meanwhile I had learned of his attempt to make some negotiation out of the contract. I thought, of course, I would never hear from him again.

Q. Was anything else done by Stickney & Company, or any one representing them, under the option clause of the contract between him and yourself?

A. No; nothing was ever done and no effort was ever made to do anything,

389 Q. Has there ever been any application by you to Stickney before the 27th of August, 1881, to extend your time for getting the right of way?

A. No; there never was.

Q. Was there any talk before that time about an extension for either party?

A. Never.

Q. Did you make any application to Mr. De Koven for the certificate of stock, note, and assignment; and, if so, when?

A. I did. Mr. De Koven had resigned his position as cashier and was spending the winter in Florida—the winter of 1881, '82—there being a provision in the contract that the president of the Merchants' National Bank should act in his place. I applied to Mr. Blair, the president, in March for the certificate, note, and assignment. He, at my request, submitted the question as to whether he ought to make the surrender to an attorney, Mr. McCagg, who gave a written opinion advising him that I was legally entitled to these papers, but Mr. Blair declined to do so upon the ground that he doubted whether he was the proper trustee under the circumstances. I did not get them. I met Mr. De Koven not far from the 1st of May, 1882, in New York after his return from Florida and there made application to him for a surrender of the documents. He postponed any decision until he reached Chicago. He came home in a few days and submitted the matter to an attorney as to
390 what he ought to do in the premises, and was advised that his duty was clear, that he should surrender them to me or to my order — the advice of the attorneys of De Koven and Blair.

Objected to as immaterial.

This occupied some little time, and meanwhile Mr. De Koven told Mr. Turner that I had applied to him for the delivery of the certificate and note. Mr. Turner thereupon, as I was informed, served on De Koven a written notice not to deliver them to me and demanded them himself, and gave him a copy of the contract between the North Chicago City R'y Co. and myself, dated May 28th, 1880, which contained in it an order to deliver the certificate and note of that company unless $2,500 was paid in for that company in money, and thereupon Mr. De Koven declined to give them to me.

Q. Have you a copy of the contract between yourself and the North Chicago City rai-way?

A. I have a copy and will attach it to my deposition as Ex. 14.

Objected to because it is a contract between other parties than the plaintiff, but not objected to because it is a copy.

A. I did not read that contract to Mr. Stickney on the day of its date, but I told him what its contents were, except as to the amount that I was to pay.

Q. Did you get the papers from De Koven; and, if not, who did get them?

A. I never got them from him; they were obtained by the
391 president of the North Chicago City R'y Co., V. C. Turner. Mr. De Koven delivered them to him, in pursuance of his demand, on the 13th of June, 1882, and I never had the control or possession of those papers from the date they went into the hands of Mr. De Koven, on the 28th of May, 1880.

Q. What were the papers so delivered by Mr. De Koven to Mr. Turner?

A. The certificate for stock No. 27 I have already mentioned, the

promissory note of $36,847.78, and an assignment by me of my contract about the right of way. Mr. Turner received the assignment and handed it to me afterwards.

Q. Who had the possession of that certificate of stock and promissory note at the time of that conversation with Stickney, in June, 1882?

A. The North Chicago City Railway Co.; the certificate from De Koven had been assigned to Mr. Turner and delivered to him as president, and on the 16th of June, 1882, he surrendered that certificate; it was cancelled, and a similar certificate, No. 34, was issued to Volentine C. Turner, president, and delivered to him.

Q. Did you ever have possession of those papers afterwards?

A. I never did.

Q. What arrangement, if any, after the surrender of those papers in September did you make with the North Chicago City R'y Co. in respect to it?

A. As I recollect the time, it was in the first part of July,
392 1882, that I made a new arrangement with Mr. Turner as president. He then agreed with me verbally that I might have until the first day of the following October in which to pay $25,000 for his company's interest in the stock and franchise of the Evanston Company and the note for $36,847.78, but that he would retain the control and possession until the cash was paid, and if I did not pay the money by the 1st of October his company would be at liberty to dispose of the matter as they could to anybody else. He stated to me he felt under some obligations to allow me to have that property if I could succeed in raising and paying the money. I told him I could not pay the $25,000 unless I made a sale, and this time was given me to enable me to do that if I could.

Q. Did you succeed in making any arrangement for a sale of that certificate of indebtedness; and, if so, to whom?

A. Yes, sir; I did. On the 8th of August, 1882, I made a sale to J. C. Easton and John W. Carey.

Q. What was done with the papers at that time—the certificate of stock and the note?

A. At that time they were still held by Mr. Turner. I had no other right to them than the verbal contract I had made with him a short time before, but on the 19th of August, 1882, Mr. Turner placed that certificate of stock No. 34 and note of $36,847.78 in an
envelope and sealed it up and made this endorsement upon
393 it: "This envelope, with its contents, is to be delivered to Edwin Walker or W. C. Goudy upon the payment of $25,000 on or before Sept. 5, 1882, and in case of failure of making such payment this envelope and contents to be returned to me. August 19th. V. C. Turner." That envelope sealed up, with the contents, V. C. Turner deposited in the Commercial Nat. Bank by agreement with me, to be held in escrow until the sum named on the back of the envelope, $25,000, was paid into the bank to his credit by the 5th of September, 1882. On the 24th of August Mr. Easton was in the city and inquired about how they were to get the transfer made to them. I told him of this deposit in escrow. He was not exactly satisfied be-

cause it provided that it might be delivered to me as one of the persons, and he went with me to the bank and I endorsed on the bottom of the same envelope these words: "The delivery is to be made upon the payment aforesaid to Edwin Walker or J. C. Easton. August 24, 1882. W. C. Goudy." So that it was placed out of my power to obtain it even on the payment of $25,000.

Q. When and how were the certificate and note delivered, if delivered at all, to Easton & Walker?

A. On the 5th of September, 1882, there was a meeting of directors of the Evanston Company in the Ashland block, at which a change was made in the directors, and at that time Mr. Turner was present, as well as myself and Easton and Carey. Mr. Easton gave a check on the Commercial Nat'l Bank that was certified,
394 payable to Turner, for $25,000, and at the same time he gave me another check, which, I believe, was not certified, for $10,000, and Mr. Turner procured this deposit in escrow from the bank by the consent of the parties named in it, and it was brought over there and opened, the certificate and note were taken out and delivered by Mr. Turner, on receiving his certified check, to Mr. Easton, on the 19th of Aug., 1882, I still being president and Mr. Chandler secretary. I prepared a certificate for the 875 shares No. 36 to J. C. Easton and placed that in another envelope, leaving it in escrow at the Commercial Nat'l Bank at the same time, to be delivered to Mr. Easton on his paying the $25,000 for Mr. Turner and the further sum of $19,000 for myself, and on the 5th of September that certificate was also handed over to Mr. Easton, it being intended to cover the same shares in the certificate in Mr. Turner's name.

Q. Was any change made in the directorship of the company on or about the 5th of September?

A. Yes, sir; there was no meeting of stockholders on that day. There was a meeting of directors on the 4th of September and some business was done and another meeting was held on the 5th of September, as I have stated, and at that meeting the existing directors were myself, acting as president, V. C. Turner, Geo. Chandler, Samuel B. Chase, Ebenezer Buckingham, John W. Ela, and Thomas Parker; of these persons Mr. Turner, Mr. Chase, Mr. Chandler, and
395 myself attended this meeting; the others did not. Mr. Buckingham sent in, however, a written resignation, which was accepted, and some person, I don't remember who, designated by Mr. Easton, was elected to fill that vacancy; then Mr. Chase resigned and some other person, designated by Mr. Easton, was elected to fill that, and then Mr. Turner resigned and the same thing was done, and I resigned and the same thing was done, so that the five directors were there changed, leaving in office, however, Mr. Ela and Mr. Parker of the old board.

Q. Were you informed or did you know whether Easton and Carey were making that purchase for any association or any other persons or corporation than themselves?

A. I did not know for whom they were making the purchase. I was informed at the time that they were making it for some persons.

I think the road was forming a syndicate and that it was not for the Milwaukee & St. Paul road.

Objected to as hearsay.

Whether that was true or not I did not know.

Q. Did you make any effort to sell the stock or control of the Evanston Company to the Chicago, Milwaukee & St. Paul; and, if so, when and what was done?

A. I did. I first endeavored to sell it to that corporation in the spring of 1880; my recollection is I went with Mr. Walker from Chicago to Milwaukee on the 27th of April, 1880, where I had an interview with Mr. Mitchell, the president, and Mr. Merrill, the
396 general manager of the St. Paul Company, and laid before them the subject. They took it under consideration, and in a few days I was informed by Mr. Walker that Mr. Mitchell was opposed to making the purchase and they would not have anything to do with the matter.

Q. Did the effort amount to anything?

A. Nothing at that time. Subsequently, in January, 1882, I had an interview with Mr. Merrill in Chicago about the same matter, which was just following the information I had received that Hill had offered to sell it to them. We had an appointment with Mr. Mitchell for him to come here two or three times, but he never got here. I did not see Mr. Mitchell. No definite answer was given at that time. Mr. Mitchell was about going to Florida, and Mr. Wadsworth, vice-president, was down there at that time, and they said that Mr. Mitchell would talk it over with Wadsworth when he got down there. I subsequently called to see Mr. Wadsworth, some time in March, in New York to get an answer, and he said they could not undertake the enterprise, giving some reasons for it I do not remember. At a later time, on—I think it was not far from the first of May, Mr. Walker and I went to Milwaukee to see if I could not succeed in inducing them to go into this business. Mr. Walker went along, at the request of Mr. Mitchell or Mr. Merrill, as their advisor or their attorney. It was talked over again, and I left some documents and maps there, which were returned to me directly afterwards,
397 with the statement that Mr. Mitchell was unalterably opposed to the St. Paul Company having anything to do with it, and that was the end of my efforts to sell to them. Afterwards Mr. Walker, having become acquainted with the property and the franchise, spoke to me, some time about the middle of July, perhaps the 20th of July, and asked me whether the Evanston franchise was still obtainable. I told him it was, and he said that there was some parties, either here then or would be in a day or two, that wanted to talk about it—to see about it—and he thought it meant business. Immediately afterwards I had an interview with Mr. Walker, and in the early part of August we met Mr. Easton and Mr. Carey, and it resulted in the contract of August 8, 1882. The interview with Carey was on the 21st of July.

Q. Did you go to St. Paul in the month of August, 1882, and

have an interview there with Stickney and Hill? If so, state what you went for and at whose request and what took place.

A. I went to St. Paul, reaching there on the 15th of August, 1882. I went at the request of Easton and Carey. The object of going there was to procure, if I could, from Stickney the certificate for the 110 shares of stock. I had promised to get that stock or that certificate if I could, and they had named some sum they would be willing to pay; it seems to me it was a thousand dollars; at any rate I offered when I got up there $1,500 for it.

398 Q. Did you get the certificate?

A. I did not. Mr. Stickney stated that under the circumstances he was placed in he thought he ought not to surrender the certificate without the consent of Hill, and the proposition would have to be made to him. The last time I saw him on that visit he told me that he would not give up the certificate; that he would turn it over to Hill.

Q. Had you seen Stickney or had any correspondence after the interview in June at Chicago and before meeting him at St. Paul in August?

A. No, sir.

Q. Did you ever see or have any correspondence with Mr. Hill before meeting him in St. Paul?

A. I never did, according to my recollection. I see that Mr. Hill testifies he saw me in Chicago at the Pacific Hotel, and was introduced to me; had no conversation with me, but heard some conversation between me and Stickney. If I ever saw Mr. Hill or if he was ever introduced to me I don't remember it, and I did not hear his name. If he had been introduced to me so I would have heard his name I would have remembered it, because the circumstances and knowing him generally by reputation would have impressed it on my mind. I will not say that Mr. Hill did not see me at the Grand Pacific, but if he did I did not see him to know who he was. I never saw him to know him until I met him at his own office, in St. Paul, on the 15th of August, 1882.

399 Q. What offer was made by Stickney and Hill of money in performance of the contract of May 28th, 1880?

A. None of any kind. Mr. Hill said to me in the course of the conversation, What is there in the way of our going on and building that road if we pay more money to enable you to get up the right of way? I having previously stated it would take $15,000 more than had been provided for that purpose. I replied to him that I had not the control of the franchise or its stock or property; that it passed from my hands; had been recalled or claimed by the North Chicago City R'y Co. I don't remember whether I said Mr. Turner or gave the name of the company, but there was no offer made except as it might be implied from that conversation to pay any money or to do any work. There was no mention of paying the $25,000 or any other sum.

Q. Did you, in these interviews or either of them, say to Hill or Stickney that you wanted to dispose of the road or enter into a con-

tract with other parties and name the Milwaukee & St. Paul people as such parties?

A. I did not, for I had no authority or right to dispose of it at that time whatever. It had been disposed of by the contract of August 8th, and, as to the Milwaukee & St. Paul road, that was never mentioned in any way, shape, or manner, and it was not true, within my knowledge, they had made any purchase of it. I recol-
400 lect distinctly I told them it had passed from my hands to the control of the horse-railroad company or Mr. Turner.

Q. Was any notice given to Ela & Parker, as directors of the Evanston road, of the meeting held September 5, 1882, when the control of the company was transferred to Easton & Carey; and, if so, how was it given?

A. A written notice was sent to each of them the evening before the 5th of September of the meeting by mail. Those letters were prepared in my office by Mr. Chandler, as secretary, and mailed to them.

Q. Did they or either of them attend the meeting?

A. Neither of them did.

Q. Was any call made for the payment of the stock of the Evanston Railroad Company in 1882; and, if so, when, and what notice was given?

A. A call was made at a meeting of a board of directors held Sept. 4, 1882. Written notices were immediately issued to each person appearing to have certificates of stock, and among them was one to Mr. Stickney. A copy of that notice is attached to the depositions taken in St. Paul, as the second paper, as Exhibit I.

Q. Was any payment made in answer to that call; if so, when and by whom?

A. Payment was made by each of the holders of stock or certificates of stock before the 20th of that month, except by Stickney, Ela, and Parker. Nothing was paid by either one of them.

401 Q. What connection, if any, have you had with the Chicago & Evanston railroad since the 5th of September, 1882?

A. I have been employed as a lawyer to do some business for them in court and try some cases, and I attended to some matters of procuring right of way since that time under employment. I have had no official connection with it in any way.

Q. By a contract of May 2, 1880, it appears that you obtained and paid for the right of way from the city limits to Calvary cemetery and to adjust accounts of the Pacific Railroad Company and to pay any balance due to it; also to render professional services as to the right of way in the city if any suits should be commenced involving the title, and in addition to cause to be transferred 875 of the one thousand shares constituting the capital stock of the company and note for $36,847.78 and assign your right to the $25,000 compensation from the company for the right of way and give the control of the company to Stickney, whereby he would own the right of way in the city and tracks laid on the same and on the new routes you were to acquire, for which you were only to receive $55,000, out of which $25,000 was to be paid to the North Chicago City R'y Co.,

leaving $30,000 to meet and cover your disbursements and services. I ask you whether or not there was any other or different consideration or benefit which you were to receive.

Objected to as immaterial.

402 A. Yes, sir; the main one, namely, the construction and operation of the road which was embraced in the contracts; that was the main consideration to me in the whole arrangement, I being interested as owner of the land that I mentioned, and which I wished to unload without loss of money.

Q. By this contract it also appears that in a certain contingency Stickney might take the certificate, note, and assignment in De Koven's hands on the payment of $25,000 to him, which was to go to the North Chicago City Railroad Co., so that Stickney would get the franchise and stock of the company for $45,000. Was there any understanding or agreement as to the benefit to be derived by you in that event.

Objected to as before, and also because it tends to add to the written contract by parole.

A. It was the same benefit to me, namely, the construction and operation of the road, the loss being to me, in that event, as I understand it, $10,000, and the liability to damages on a sum not exceeding $30,000.

Q. If there was a failure on your part so Stickney had a right to pay the $25,000 by the 1st of July, 1881, what was then to occur, if anything?

Objected to.

A. He was to get by the contract the control of the company and its franchise and its stock, and I was to have $20,000 first
403 paid on so much of it as might be left, if any, unexpended; and also to get the road constructed and operated.

Q. Before Lowry called on you in May, 1882, what had you done, if anything, on the understanding that Stickney and his associates had abandoned the contract and intention to build the road?

Objected to as immaterial.

A. I had made numerous inquiries for parties who might be induced to build that road. I had employed Reed & Hurlbert, of New York and Chicago, brokers, to find a purchaser. They had, amongst others, put me in connection with Calvin Littlefield, of New York, and Judge Low, of New Jersey, who were railroad men of pretty extensive connections, and carried on negotiations with them; finally agreed upon terms which failed at the last minute, when it came to the execution of the contract. I spent during that time, probably, two months on this business in trying to get somebody else to take this enterprise. Part of it was with the St. Paul road and part with these persons I have named and one or two other persons. During that time I spent in New York one month of time in these efforts and negotiations, and had employed attorneys and others, and paid out considerable sums of money.

Q. Did George Chandler have any interest in the Evanston Company *of* stock?

A. None at all.

Q. Did he have any connection with the contract with
404 Stickney or render any service in procuring right of way, and on whose request?

A. He had no connection with the contract, but at any request did a good deal of work about procuring the right of way condemnation proceedings, contracts, &c., for which I paid him.

Q. Was he present at any of the conversations between you and Mr. Stickney?

A. He was at a good many of these, if not all, but not during the whole of them. Mr. Stickney came to the city at some of these times and Mr. Chandler. Not being as busy as I was, he would talk with Mr. Chandler in his room. Sometimes I came in and the conversation went on; sometimes he came into my room without Chandler and he talked.

Q. Did Turner, Buckingham & Chase have any interest in the Chicago & Evanston and its stock or in the contract?

A. None whatever. The stock they held was merely to qualify them for directorship; and also in the case of Turner & Buckingham, who were stockholders and directors of the North Chicago City R'y, they held as trustees quite a large number of shares.

Q. In the bill appears the following allegation: "That the defendants Goudy, Turner, Chase, Buckingham, and De Koven conspired together to defraud said Stickney & Co., your orator, and induce said Stickney to go into said contract, Exhibit C, and paid said sum of $20,000 to said defendant Goudy." I will ask you what, if any, truth there is in that allegation of the bill?

405 A. None whatever; it is wholly false. None of those parties had any connection with the negotiation, had no knowledge of the terms and no connection whatever with the $20,000 that was to be paid to me, and no interest in it and no benefit to be derived from it.

Q. Was Mr. De Koven present during any negotiation leading up to the contract of May 28, 1880?

A. He was not.

Q. Were the contracts of that date read over in the presence of Mr. Turner while Mr. Stickney was also present?

A. No, sir. It is my impression that I stated to Mr. Stickney they had been read to Turner.

Q. Did you state to Mr. Stickney in the course of the negotiation the parties by whom the franchise and stock of the Chicago & Evanston were owned?

A. Yes, sir; I did.

Q. Who did you tell him owned them?

A. I told him they were owned by the North Chicago City Railway Co., and that company had advanced a considerable sum of money which they wished to have repaid, and were willing to give up this franchise if they could get their money back.

Q. Did Stickney authorize you to make an arrangement with the

St. Paul Co. for right of way on Hawthorne Ave. for $40,000? If so, what steps did you take in pursuance of that authority?

406 A. I have stated the facts about that matter. He hardly authorized me, but suggested I should do it. I never made any suggestion to Mr. Atkins who had made the application for the St. Paul Co.

Q. State again, as I think you have already stated, when you first saw Stickney after Mr. Lowry called on you in May, 1882.

A. June 16, 1882.

Q. When did you next see him, and where?

A. At St. Paul, on the 15th day of August, and I believe also on the morning of the next day, but I am not sure.

Q. Did you in that interview with Mr. Stickney at St. Paul, at the time referred to, state that you were not in a position to be compelled to pay anything if judgment was obtained against you, or you were not worth anything, or they could not collect anything from you, or you were not responsible or had no property in your own name?

A. I did not make the statement in that language nor anything equivalent to it. I went at Mr. Stickney's request to the office of the Manitoba R'y Co. to meet Mr. Hill, he having told me he could not make any arrangement about the matter without his consent. I there met Mr. Hill, Mr. Angus, and Mr. Stephens, all of them connected with the railroad company. I had previously inquired of Mr. Stickney before going there what the answer was to my proposition to pay $7,500, which I submitted in Chicago when he

407 was here in June. He stated that Mr. Hill would have to give an answer to it. When I went into Mr. Hill's office the subject was introduced in some way, so I immediately made a statement and renewed that proposition. In that statement I claimed, as I had distinctly before, that I was not legally liable for anything that I had spent in the procurement of the right of way and rendered my own services, so that more than half of the money had been exhausted and I was willing to return them about the amount I had not spent as a matter of compromise, a matter of common fairness, if that was satisfactory, denying all the time I was legally liable, and denying they could ever get a judgment against me, but I would, however, do what I had proposed before, pay $7,500. Either Angus or Stephens, I think it was Stephens, did not seem to understand the proposition, and some one of the gentlemen present, I believe it was Mr. Hill, explained it to him, the point being they were to get $7,500. Either Angus or Stephens, I think Stephens, said with some excitement, "Are we to be chiselled out of the $20,000 in that way?" which naturally produced some feeling with me. I then stated in substance that they could not get a judgment and if they did get a judgment they might not make it. That was the foundation and only foundation there is for any such statements. There was some sharp remarks made in the course of the conversation and a little excitement and feeling all around.

Q. I will call your attention to the following extract from

408 Mr. Stickney's deposition taken in this case: "I find by re-

ferring to a diary that I kept at that time that I arrived in Chicago at 8 o'clock in the morning of February 21, 1881, from New York; that I left there on the 23d of February, at 9 o'clock p. m. During the time I was in Chicago I called upon Mr. Goudy and asked him how he was getting along in regard to this right of way. He replied that he had not met the success he expected, and did not know as he would be able to have it all completed at the time the contract called for, and asked me if I would make him any trouble in case he failed. I told him no; we should not make any point on the question of time if he did not. He said it would be impossible for him to complete his contract by the 1st of March; that he would want an extension of time. I told him that was all right; he could have any reasonable time he required after that, and we did not want to make it any more burdensome to him than was absolutely necessary. I called on Mr. Goudy again on the 13th of April, the same year, and he still asked for further time, which was granted to him." I ask you if that is a correct statement as to the conversation between you and Stickney; and, if not, state what did occur.

A. That is not a correct statement; a portion of it is correct, a portion of it is not. I can readily see how Mr. Stickney made a mistake without intending to do so. I did tell him at that
409 time that I could not complete the right of way for two weeks. I also told him I had met with great difficulty in my efforts to secure it; that the property-owners had been dilatory and postponed action. Some of them were asking money for it where I expected to have it donated; some were asking more money than I supposed would be required, and for these reasons the expenses were larger and there had been delays, but that I hoped and expected to complete the business within a few weeks after that time. I did not make any application to him for any additional time, nor did he say to me that I might have any. He may have made the remark that a few weeks would make no difference to him, but I have no recollection of it. I understand myself at that time that I had until the 1st of June. As to the 13th of April, as already stated, I was not in Chicago, but was in Massachusetts. When I returned home I learned from Mr. Chandler that Stickney had been here, and he told me that Stickney had said to him that a few weeks would make no difference to them about the completion of the right of way, or something to that effect.

Objected to as hearsay.

Q. Did you have any conversation with Mr. Stickney on the 13th of April, 1881, or about that time?

A. None whatever; it was impossible.

Q. Are you personally acquainted with the complainant,
410 James J. Hill; and, if so, where did you first meet him? Were you introduced to him at the Grand Pacific Hotel at any time?

A. I believe I have fully answered that question.

Q. When were you informed Mr. Hill had any interest with Stickney in the contract, and by whom was such information given?

A. The first positive information I had upon the subject was received from Stickney in the interview on the 13th of June, 1882. I had heard, about the 1st of the preceding January, through Mr. Walker, that Hill was offering to sell the contract, from which I inferred, of course, that he was one of the persons interested in it. I have already stated the suspicion I had from the examination of the hotel register.

Q. Mr. Hill in his deposition, referring to the interview with you at St. Paul, states as follows: "We told him that we were ready to carry it out at any time that he could secure the right of way and put us in a position where we could carry it out." Was any such statement made to you at the interview at St. Paul?

A. I don't remember it in that way. He might have made some statement of the kind, but if he did I failed to hear him. As already stated, I had lost control of the stock and franchise.

Q. What arrangement had you, if any, with the North Chicago City R'y Co. in respect to the franchise and assets of the Chicago & Evanston Railroad Co. at the time of your preliminary agree-
411 ment with Mr. Stickney, in February, 1880, if I recollect right? If it was in writing produce it if you have it, and if not state what it was in substance.

A. There was no writing. Just before Mr. Stickney called on me or about that time I asked Mr. Turner if he would not sell the Evanston to me, and if he would for what price. He consulted with some of the other directors and told me he would sell it to me, and there were different sums talked about. The first sum named was the amount of the indebtedness, $36,000, and finally he said I might have it for $30,000. I told him I could not pay the money on the purchase unless I succeeded in finding a purchaser for it; it would be an arrangement simply to enable me to sell it to somebody else. I don't remember what the amount was that he had agreed to let me have it for at the time of the contract in February, but before the contract of May 28, 1880, was made the amount — fixed by agreement between him and me at $25,000, to be paid in cash; no time fixed when it was to be paid, but it was to be paid in money. When the negotiations were going on between Stickney and myself, resulting in the contracts of May 28, 1880, ascertaining that Stickney did not wish or did not want to pay more than $20,000 in cash at the time, I reported that fact to Turner and told him I could not get in the transaction money enough to furnish me means for getting
412 in the right of way and pay his $25,000, and asked him if he would agree to defer payment of it and take it in installments, and he said he would. When we settled on the terms I said to Mr. Turner, or asked him, to come into my office and read him the contract we ultimately signed for the purpose of showing him how his money would be secured, and he expressed his satisfaction with that arrangement, provided that the stock and note were placed in escrow with De Koven, and not to be delivered until he got his money.

Q. Was that the time the agreement between you and the North Chicago City R'y Co. was executed which has been offered in evidence?

A. Yes, sir; that was executed on the same day with the others.

Q. What was the object in executing that contract in writing at that time?

A. So as to preserve the evidence of the contract, and also there was another. It contained an order on De Koven to deliver the stock and note to Turner in case the $25,000 was not paid to De Koven for the use of the North Chicago City R'y Co.

Q. Is this the contract, Exhibit 14, the substance of which you stated to Stickney, as you have already testified?

A. Yes, sir.

By Mr. WALKER:

Q. You referred in your examination to a settlement of an account of the Chicago & Evanston with the Chicago & Pacific
413 R. R. Co. of the interest that each had in the track that was laid on Hawthorne Ave. Do you remember who that settlement was made with?

A. It was made with you, Edwin Walker, as president of the Chicago & Pacific railroad.

Q. You have also introduced certain contract that you had with Mr. Stickney at the time the settlement was made with me as an officer of the Chicago & Pacific. Was anything said about any contract that Stickney & Co. had with you or any other party relative to the Chicago & Evanston road?

A. Nothing whatever. I had not disclosed that to anybody at that time.

Q. At the time the contract was made for the extension or, rather, for the use of some 1,500 feet of the track laid by the Chicago & Evanston north of the junction was anything said then about the interest of Stickney & Co. in the property of the Chicago & Evanston or any contract they had with you or any other party?

A. No, sir; the arrangement was made with the Evanston Company as a corporation, and I was president of that company at that time and acted as such in making the arrangement.

Q. At the time of the making of the subsequent contract with Carey & Easton what, if anything, was said about the contract with Stickney & Co. that was set out in this bill of complaint, and what knowledge had they of the existence of the contract, if any?
414 A. So far as I know, neither one of them knew of its existence. I did not communicate any information to them on the subject.

Q. Are you familiar with the records of the Chicago & Evanston Company—the old records?

A. Yes, sir.

Q. Will you state whether or not the contract between yourself and Stickney & Co. was transferred to the records of that company?

A. It was not.

Q. Any action to your knowledge by the board of directors of that company touching that particular contract?

A. No; not the contract between Stickney and me; there was in

regard to the contract with me about the right of way and with Stickney about building the road.

Q. Any reference made to the contract with Stickney for the sale of these certificates for stock?

A. No, sir.

Cross-examination by Mr. COLE:

Q. You say there was on the records of the Evanston Company something with reference to the contract with Stickney for building the road. What was it?

A. The contract itself was copied on the record and was authorized by the directors to be executed.

Q. Did Easton and Carey examine those records prior to their purchase?

A. I do not know that Easton did. Mr. Carey asked me for
415 the book and I gave it to him. He took it home with him to Milwaukee and kept it over night at least, if not longer, before it was returned; what examination he made of it I don't know.

Q. Carey is the general solicitor of the Chicago, Milwaukee & St. Paul, as you understand?

A. He was at that time and I believe still is.

Q. That was while negotiations were pending and before their consummation of the sale to Easton and Carey?

A. As I understand, Carey has been general solicitor for several years.

Q. The time he took this home was pending negotiations and prior to their consummation for the sale to Easton and Carey?

A. The first time I saw him in regard to that was the 21st of July, 1882; it was between that time and the 8th of August following.

Q. It was prior to the time these negotiations were consummated with Easton and Carey?

A. Yes, sir; that was done on the 8th of August.

Q. Has Walker ever examined the records?

A. I suppose he did; but he never did it in my presence.

Q. How much stock of the Chicago & Evanston road did you hold at the time of these contracts as trustee for the North Chicago City Railway Company?

A. My recollection is that I held at that time about 200 shares, though I am not certain as to the number of shares.

416 Q. Was it in your name absolutely in the certificate and on the books?

A. Yes, sir—that is, it didn't have the word trustee.

Q. So far as appeared from the records of the company it stood absolutely in your name?

A. Yes, sir.

Q. All the time—referring to the time these contracts were executed which are in controversy—were you attorney in behalf of the North Chicago and the Chicago & Evanston?

A. I was attorney for the North Chicago City R'y Co. and I was president of the other company; there was no attorney.

Q. You were the only legal adviser the other company had, were you not?

A. I do not think it had any.

Q. You represented and acted for the other company in all matters that a president ordinarily acts for a company, I suppose?

A. Yes, sir.

Q. The reason why it had no attorney was because you considered yourself competent to determine any legal question?

A. I suppose that was the reason; I thought I was able to do it.

Q. Were you a director in both companies?

A. Yes, sir.

Q. Where were the offices of the two companies kept?

A. The North Chicago City railway is 430 North Clark St.; the office of the Evanston Co. was at my law office, 162 Washington St.

Q. Who controlled the franchise of the North Chicago Railroad Company?

417 A. It had a large number of stockholders.

Q. Who were the directors?

A. The directors at that time were V. C. Turner, Jacob Rehm, Geo. L. Dunlap, and myself; there was a fifth one, I don't remember who it was at that time, it has been changed several times; I think it was Mr. Buckingham at that time.

Q. When, with reference to Lowry's visit, did you cease all attempts to get the right of way?

A. I had not ceased all attempts to get the right of way at that time, and never did until I had made the contract with Easton & Carey; since that time as attorney for them I have procured some rights of way.

Q. Were you engaged in efforts to obtain right of way during all the year 1881, at intervals?

A. Yes, sir.

Q. Were you also engaged in the business during the winter of 1882, prior to May of that year, at intervals?

A. To some extent, not very largely; I was then trying to find somebody that would agree to build the road chiefly.

Q. Had you fully completed obtaining the right of way in 1881?

A. No, sir.

Q. Did you in April, 1882, know definitely of any other parties than Stickney & Co. who would build the road?

A. I supposed I did. It turned out I was mistaken.

Q. Had you any definite and determinate arrangement

418 with any other parties except Stickney & Co. to that time for building the road?

A. I had agreed verbally on terms with some other parties in New York, and went there for the purpose of executing the contract. One of them had been out here and examined the property; was here when Lowry was here on the 20th of May of that year, but when we came to ask the execution in writing it was postponed and fell through, although I supposed I had it arranged.

Q. Did you as late as January, 1882, know definitely of any other party than Stickney & Co. who would build the road?

A. No.

Q. Did you or could you with the money in your hands obtain the right of way before the expiration of the time limited in the contract?

A. I did not.

Q. Could you do so with the money in your hands—the $20,000 I mean?

A. That is a matter of opinion. I think not; that I could not with reference to the time; it was too short to accomplish it, and there was not money enough to pay for it.

Q. Did you up to the time expressed in the contract for obtaining the right of way continue to be interested in land on the line?

A. Yes, sir.

Q. Is the Edwin Walker mentioned by Turner on the envelope which you have spoken of the same Walker who has testified he is the attorney in Chicago for the Chicago, Milwaukee & St. Paul?

A. He is the same man.

419 Q. Was he the first one who proposed to you to go to Milwaukee to see the officers of the Milwaukee & St. Paul Co.?

A. I think I proposed to him to go in the first instance and requested him to go with me.

Q. At any rate, the commencement of the negotiation was between you and him?

A. No; I think not.

Q. The proposition, then, whether it passed from you to him or him to you, or suggestion to go to Milwaukee and see the officers was a suggestion taking place in a conversation taking place first between you and him, was it not?

A. Yes, sir; but it did not have the dignity of negotiation.

Q. Did you at any of these visits to Milwaukee meet John W. Carey, who afterwards, with Easton, negotiated a purchase?

A. I did not.

Q. Who was the first person who mentioned to you that the parties subsequently learned by you to be Easton & Carey would be likely to buy?

A. Mr. Walker.

Q. Did he first inform you that the Chicago, Milwaukee & St. Paul had been offered Hill's interest in the Evanston road?

A. Yes, sir.

Q. What object did the North Chicago railway have in advancing money to the Chicago & Evanston Company?

Objected to by Mr. Jewett.

A. I believe I will decline to answer that question.

420 Q. When was that charter obtained and what road did it own and operate at the date of these contracts?

Objected to.

A. Which charter?

Q. The North Chicago.

A. The company was incorporated by a special act of the Legisla-

ture passed in February, 1859. It owned and operated certain street railways operated by horses in the north division of the city of Chicago.

Q. Did its road have any connection—I mean any actual geographical connection—with the proposed Chicago & Evanston railroad?

A. No. Since that time one or two of the street railway lines have crossed the Chicago & Evanston track as now constructed.

Q. Do the records of the North Chicago Company show any action on its part in regard to the stock of the Chicago & Evanston railroad or the transactions in reference thereto managed and controlled by Turner, president?

A. They were not managed and controlled by him. There were determinations of questions from time to time by the board of directors. What was entered on the books of the company I do not know.

Q. How much right of way was there to be obtained at the time these contracts were made by the Chicago & Evanston railroad or for the Chicago & Evanston?

A. You refer to the contracts of May 28, 1880?

Q. Yes, sir.

421 A. It was understood that all the right of way in the city had then been secured. The right of way from the north line of the city to Calvary cemetery was to be obtained.

Q. That was all?

A. That was all.

Q. How much was that?

A. About seven miles.

Q. How much had you actually obtained and got deeds for at the time you claimed there was a forfeiture?

A. I cannot answer that question without on examination.

Q. I am not particular to be accurate. Was it half or two-thirds?

A. I do not suppose I had obtained contracts or deeds for as much as one-third of it at that time, but I had in process of being obtained by negotiation and verbal promises perhaps two-thirds of it, but not actually concluded by the execution of the papers. No proceedings at that time had been commenced or condemnation had. The first petition ever filed by the Evanston Company for condemnation were on the 2d of August, 1881.

Q. How long does it ordinarily take to press those proceedings to a completion under your laws?

A. They are considered as privileged cases. Sometimes they may be tried in a month or two; sometimes it is a year or two. It is very uncertain.

Q. Those proceedings, in the manner in which the courts sit and in the ordinary course of proceeding, it can be safely calcu-

422 lated upon that they can be closed up in six months or a year, can it?

A. Many of them sometimes can be, and some of them in a month, but in this case I had no expectation of condemning any land. I had expected to get it without condemnation.

Q. Did you ever, up to May, 1882—had you at that time obtained deeds or a completed title by condemnation to a third of the right of way?

A. Yes, sir; more than that.

Q. Half?

A. As I said before, it is difficult for me to tell without reference to the papers, but I should say I had more than half, either by contract or deed; some of them were contracts. What I had at that time, had this condition in: "That the road should be completed and operated by the 1st of July, 1882," and subsequently extensions were obtained—a good many of them.

Q. Can you state the names of parties to whom you paid money for right of way and the amounts paid?

A. That is difficult for me to do here from memory. There was money paid to the Ogden estate and other persons represented by the office where that business was done; some of the property belonged to others of the Ogden family—to A. G. Burley, to a man by the name of Gross, to a Mr. Pardee, to a Mr. Passavant, Mr. Burch Smith, and others that I cannot now name.

423 Q. In what sums, in such instances as you remember?

A. I will not undertake to state the amounts now, it has been so long since I have looked at them; it will amount to several thousand dollars in the aggregate.

Q. When was this stock which you say was issued to parties in trust for the North Chicago Railway Co. just issued?

A. When the North Chicago R'y Co. obtained control of the charter it was then represented by similar certificates.

Q. How far back was that?

A. 1865, and the transfer was made of such certificates to persons named by it. I was one of them at that time.

Q. By whom were the negotiations made and carried on by which that stock was issued and placed in trust for the benefit of the North Chicago Company—who representing the respective companies?

A. I do not know; I did not and I do not know who did.

Q. You did not represent either of them?

A. No, sir.

Q. From that time had you always had, verbally or otherwise, an arrangement by which you could dispose of this stock?

A. It was after the first of January, 1880, before I ever had any arrangement to purchase this stock or dispose of it. I had
424 endeavored before that time to sell it to other parties, acting for the North Side road, during the preceding year.

Q. What was the amount of the capital stock of the North Chicago Company?

Objected to.

A. About $500,000—the par value of the stock.

Q. How many shares did you hold?

A. At that time I held two shares.

Q. At the time of these contracts?

A. Yes, sir; $200.

Q. Who requested Chase, Buckingham, and the others who held stock in the North Chicago Company to surrender the stock in order that certificates might be issued to the company or to Turner?

A. At what time do you refer to?

Q. At the time these contracts were made. I think you stated the parties who held stock in trust surrendered it and new certificates were issued?

A. At that time my recollection is by changes the necessary amount constituting 875 shares was held by Mr. Turner, Buckingham, and myself, and Mr. Turner procured an assignment from Mr. Buckingham of his certificate and Mr. Turner and myself made an assignment and certificates were surrendered and cancelled and a new one issued.

Q. At the time Easton and his parties were appointed directors who requested the old directors—Chase, Buckingham, and I think yourself were directors at that time—to resign?

425 A. I can't tell you the particular person who did it. We were all there.

Q. It was at your instance, was it?

A. It was at my instance or Mr. Turner's. The statement was made by some one in the room what we desired to have done. Perhaps I did it. I don't recollect.

Q. Did you actually receive the $19,000 mentioned in the endorsement on the certificate, paid by Carey and Easton?

A. No, sir; I received $10,000 of it.

Q. Are you to receive the remainder?

A. It is very doubtful; I hope so.

Q. They are under obligation, are they not?

A. In my view of it. There is some denial of that.

Q. Who was present at that first interview with Easton with reference to this purchase? Was Mr. Walker present at that or subsequent interviews or any of them?

A. Walker was present at some of them, but I do not recollect so as to state that he was present at the first one. There were not very many of them. Mr. Carey did most of the talking and Mr. Carey made the examination of the rights of property.

Q. For what was the money advanced by the North Chicago Railroad Company of $36,000, and through whose hands did that money pass?

Objected to.

A. I respectfully decline to answer that question. I do not think it relates to this business.

426 Q. You spoke of considerable litigation. I think you said at one time the Chicago & Evanston was a creature of litigation. Who paid the expenses—what company?

A. The North Chicago City Railway Company.

Q. How long before Stickney applied to you had you been endeavoring to get a purchaser for the Chicago & Evanston road?

A. I made very little efforts before that. It was during the preceding year, 1879. I was not trying to get a purchaser for myself,

but for the railroad company; had endeavored to sell it to the Northwestern two or three times, simply acting for the North Chicago R'y Co., so they could get their money back.

Q. At one time you say the Chicago & Evanston railroad had $300,000 capital?

A. Yes, sir.

Q. How much stock of the company did the North Chicago hold at that time?

A. They held the same proportion. After 1872 they held nearly, as I recollect, four-fifths of it and over.

Q. How many shares after the reduction were there in all?

A. One thousand.

Q. What was the exact number of shares that were placed in escrow with De Koven?

A. 875.

Q. Then you purchased of Haskins 110⅜?

A. Yes, sir.

Q. Where was the balance?

427 A. In different persons. I held some of it myself; each director held some.

Q. That constituted all the shares except what was necessary for parties to hold in order to be directors?

A. Pretty nearly that. I think I had ten or twelve shares, something like that.

Q. What legal adviser did Turner have in making this arrangement by which the note and stock were put in escrow?

A. I don't know whether he had any or not.

Q. He had none unless it was yourself?

A. I don't know but he did have some one.

Q. To your knowledge?

A. I did not give him any legal advice about it.

Q. Do you know of any legal adviser that the North Chicago railway or Turner had in that matter?

A. No, sir.

Q. State whether the Chicago & Evanston railroad in the preparation of these contracts and the execution of them had any other legal adviser than yourself.

A. No, sir; I was acting as president, and in connection with Mr. Chandler, who was in my office in the preparation of contracts with Stickney, no lawyer was employed about it either one way or the other.

Q. After the contracts were entered into Chase, Buckingham, Turner, and yourself were the directors representing your interest, but having no beneficial interests of their own, and Ela & Parker that of Stickney?

A. Yes, sir.

428 Examination by Mr. ELA:

Q. Who obtained the charter of the Chicago — Evanston road?

A. I don't know except from tradition and reputation. I have always understood it was Bishop Simpson.

Q. You did not have anything to do with it?

A. No, sir.

Q. Do you know whether Mr. Turner or anybody connected with the North Chicago railroad had anything to do with it?

A. I believe they did not; I have no knowledge. I had a good deal to do with the Legislature about that time. Bishop Simpson was the man that procured it in the interest of the Northwestern University, as I understood it.

Q. When did the North Chicago Company commence to advance money to the road?

A. After 1865—along down from that on.

Q. Was you president of the road at that time?

A. No; not until 1872.

Q. Was any of the money advanced while you was president of the road?

A. Yes, sir.

Q. What proportion of it?

A. A very considerable amount of it. What track was built was built in 1874.

Q. Did you have the management of the road at the time the track was built?

A. I was president.

Q. Did you manage the financial part of it?

429 A. There was no management to it. All the money that was used was advanced by the North Chicago City Railway Company.

Q. Did it go through your hands?

A. I don't remember whether it did or not.

Q. Did they advance the sum of $36,857.78?

A. I believe they did. I do not know personally that it was all advanced, but I believe it was.

Q. Any security given to them for it?

A. No, sir; they held the stock.

Q. They held these certificates calling for stock in payment?

A. Yes, sir.

Q. Was that issued at the time the money was advanced?

A. It had been issued long before. They were practically treated as the owners of the franchise.

Q. No note was issued for this money until about the time the contract was made, in 1880?

A. None was ever issued before, so far as I know, and I think there was none. It was in open account.

Q. Did the North Chicago Railway Company pay anything for the stock held before they advanced the money?

A. That I can't tell you.

Q. Did you ever see any record in any books after you became connected with it showing any receipts of money from the North Chicago Company?

430 A. I never did, and never looked to see.

Q. Do you know whether anything was paid for the 875 shares by anybody?

A. That was done before I had any connection with the road at all. I had nothing to do with the transaction.

Q. Do you know whether there is anything on the books showing receipts of money for that stock?

A. I don't know whether there is or not.

Q. Ever see any subscriptions for it?

A. For what?

A. For the stock on the books of the company.

A. I have seen, on the Evanston Company's books, copies of subscription lists for stock made in 1861, and then again in 1864, I believe, when the stock was increased.

Q. Did both of these subscriptions contain the name of the North Chicago Railway Company?

A. That is before they had any connection with it; they were subscriptions for individuals.

Q. How much stock did those subscriptions cover?

A. The stock subscribed, as it appears there in 1861, was $80,000 of the $100,000, and the balance of it was subscribed in 1864, and immediately thereafter it was increased to $300,000, and that was subscribed by different persons.

Q. But no certificates issued?

A. I don't know.

Q. And no money paid?

431 A. I don't know. I am telling you what is shown in the record.

Q. Then you don't know, and you don't know of any records showing whether anything was paid by the North Chicago R'y Co. or anybody else for that 875 shares of stock?

A. No; I do not know personally. I have heard something about it, but I don't know anything about it.

Q. During the whole time that the North Chicago City Railway Company held control of this road and a large majority of stock were they, so far as you know, trying to dispose of it?

A. I never heard of any effort to dispose of it before about 1878 or '9; one of those years.

Q. In the talk between you and Mr. Turner in regard to disposing of this stock was it one of the conditions that it should be disposed of to some one who would build the road—that is, a condition made by Mr. Turner?

A. No, sir; I made that condition; he did not.

Q. He simply cared about getting his money back without reference to the building of the road?

A. That was the situation of the North Side Company, and he was willing to take less than that amount.

Q. You say that a meeting of the directors of the road and the transfer of this stock to Mr. Easton a call was made for the payment of the stock, including, I believe, the 110⅜ shares. Did you state that stock on which payments were not made was de-

432 clared forfeited?

A. I did not state the call was made after the transfer to Easton, but it was made after the 8th of August, and the transfer

was not made until the 5th of September. I did not state anything about any forfeiture.

Q. Was not the call made after the arrangement had been perfected between you and Easton and others for the sale of stock to them?

A. Yes, sir; that was made on the 8th of August, but no transfer had been made or any money paid. It was a contract subsisting.

Q. Who were the directors at the time the call was made? Were they the old directors?

A. Yes; you were one of them and Parker was another. There was Chandler, Turner, Chase, Buckingham, and myself. I believe that is all.

Q. When were the resignations made and the new directors elected?

A. That was at the meeting the next day—September 5th.

Q. A call was made for payment within a certain time?

A. My recollection is it was to be made by the 15th of that month.

Q. Do you know what the proceeding was on the 15th or after the 15th in regard to any forfeiture or sale of stock?

A. I was not a director or an officer, but I was present at the meeting, I believe, on the 20th, a short time, when some action was taken about that; at any rate, a report was made there. All
433 the stockholders had paid in full to the treasurer except Stickney, Ela, & Parker. I don't recollect now whether there were any proceedings taken about the forfeiture at that time or not.

Q. Were you present when there were any proceedings?

A. I don't remember I was; at any rate, I had no connection with it.

Q. The directors present at the meeting you speak of—the last meeting—were the new directors who were in after the new arrangement which you made with Easton, were they not?

A. So far as they were there they were the same men. I think the board was not full. I do not recollect the persons who were there.

Q. Whatever action was taken on that call or with reference to stock which was not paid for was by the directors who came in representing stock which had been sold to Easton?

A. I believe so. Neither you nor Parker were there. Whether you had any notice of the meeting I don't know.

Q. Why was this call made on the 4th of September?

A. I know of no other reasons except those set out in the call itself.

Q. For the payment of debts?

A. It states in the call what they were. I don't remember now. I think it was to pay debts and to pay for right of way and
434 to build the road.

Q. Raise money to build the road?

A. I believe that was so. At any rate, the true causes were stated in the call. A copy of it is attached to one of the depositions as an exhibit here.

Q. Mr. ELA: We want to give notice to attorneys for defendants to produce the records of the Chicago & Evanston railroad containing proceedings of the meetings of directors, including the Sept. 4th meeting and from that on. We require the production of those books at the time of taking further testimony for the defendant before the master in this case.

This request is made when Mr. Jewett only is present and when no attorney representing the Chicago & Evanston railroad was present.

Cross-examination resumed by Mr. COLE:

Q. This stock was delivered up by De Koven to Turner at what date?

A. June 13, 1882.

Q. At what date was the arrangement made between you and the North Chicago Company by which you were to have until the 1st of October, 1882, to pay them $25,000?

A. I can't give the exact date, but it was between the 1st and middle of July.

Q. At any rate, at the time of the interview between Mr. Hill and Stickney in St. Paul this arrangement was existing?

A. No, sir.

435 Q. Or at least it had been made prior to that time, and the time limited had not then expired?

A. At that time it had been made and I had made the contract with Carey & Easton.

Q. But at that time this arrangement had not expired?

A. No; it was to run to the 1st of October, but it had been consummated by this arrangement of Carey and Easton, and there was no occasion for using it any further.

Q. The stock was delivered up the 13th of June, and Stickney was here the 16th?

A. That is correct, and I stated to Stickney in that interview the stock had been surrendered by De Koven to Turner for his horse-railroad company.

Mr. ELA: Did you notify Stickney or Hill or anybody in connection with this transaction before you had this stock delivered up that you claimed a forfeiture of the contract or that you was going to have the stock delivered up?

A. I never gave any notice to that effect, but I had stated so to Stickney in the December preceding, and he then stated that the contract had ended by its terms. We had a conversation, both of us, to that effect, as I have already testified, so that he knew that it had been forfeited.

Q. He knew the contract had been ended by its terms; that was all of that; that was all that was said?

A. He made no claim at that time that there had been any extension. I never heard any claim of any extension until the

436 talk with him on the 16th of June, 1882.

Q. You made no claim at any time there had been forfeiture?

A. Yes, sir; I did.

Q. Simply by saying the contract had expired by its terms?

A. I did not use the word forfeiture, but the contract had ended by its terms.

Q. No reference made to extension by either of you?

A. There was no pretense of any extension. It was not mentioned there had been any extension, nor was it said there had been a forfeiture, nor did I serve a notice of forfeiture, but Stickney knew and we both said in that conversation that the contract by its terms had expired. There was no claim it had been extended.

Q. There was nothing said about extension?

A. Nothing said about it. There was this said, he asked me to give him a letter of some kind by which it would be extended. I don't recollect the exact language about that. It was a letter he wanted to show to his parties that they might have some right to go on with the contract.

Mr. JEWETT: Did you give him that letter?

A. I never wrote the letter. It was only three or four days when I heard of their attempting to sell it out, and I concluded the thing was ended.

Mr. ELA: Did you understand whether this stock was owned by the North Chicago City R'y Co. or by Turner?

437 A. It was owned by the company. Turner had no individual interest in it any more than I had.

Q. You say you don't know whether there was any authorization by the directors for these different contracts made by Turner?

A. I knew there was a consultation among the directors by which he was authorized to sell it to me. I don't know whether it was entered of record.

Q. But he and the directors knew all these different times when you were attempting to make this sale that the sale was not to you for yourself, but depended on the making of the sale to somebody of the road?

A. I have not stated that. The sale was to me, but my ability to pay for it depended on my selling it to somebody else. I did not act as agent or attorney for the North Chicago Co. The sale was to me, but so far as the payments were concerned it was understood I had not means to pay for it unless I could make a sale to somebody else, and the payment was deferred until I could accomplish that.

Q. Each time they understood that the sale to you depended on your making a sale to somebody else?

A. Not the sale, the payment depended on it.

Q. Did not the sale?

A. No; the sale was made independent of it. They understood they would not deliver it to me and I would not get it until I paid for it. It was not to be a consummated transaction until I paid for it.

438 Q. There was no reason you know of why the company should insist on having payment by any certain time at these different times?

A. No, sir; they were liberal with me about that; all they wanted was their money. Mr. Turner was perfectly contented with the installments fixed in the contracts; he was to get one-half of his pay out of the first installment and one-half out of the second.

Mr. JEWETT: How was he to get his pay provided neither installment was paid?

A. The $25,000 which was an alternative payment and by which he was secured so that he would get payment in any event, whether I got anything or not.

Mr. ELA: How long was it after the last time when you say Mr. Mitchell declined to have anything to do with purchasing it for the Milwaukee & St. Paul that Mr. Walker said to you that he had some other parties he thought meant business?

A. It was about two months.

Q. I believe you stated that at the time you was in St. Paul, August 15th, you did not tell any of the parties there that you had entered into negotiations or made any arrangements with these other parties?

A. I did not; I am very positive about that. I did not intend to tell them and I was very particular not to tell them; all I told them about that was the stock and note had been reclaimed by the North Chicago City R'y Co. or Mr. Turner; I don't recollect which I named.

439 Q. Do you know at the time the notices were given that you speak of, the meeting of directors of which you say the letters were prepared in your office to Ela & Parker, that Mr. Ela was East during the whole month of September? Do you know as a matter of fact I was not in the city?

A. No; I do not. I am quite sure I understood Mr. Parker was in town; I don't recollect about Mr. Ela.

Q. The Chicago & Evanston road had been engaged for a good while and about ever since the new directors were chosen that you have spoken of, were they not, in condemning land for right of way?

A. They condemned some land for right of way in addition to what was contemplated or included in the line at the time of the sale to Easton & Carey, and had procured an ordinance extending the line down to the Union depot, and changed the line from Southport Ave. on to the property which was purchased, and at the same time they have actually constructed the whole line between the points contemplated in the contract with Stickney—that is, from the junction of Larrabee and Hawthorn Ave. to Calvary cemetery.

Q. Has there been a great deal of litigation by or against the Chicago & Evanston railroad ever since the new organization?

A. Yes, sir; they have been busy. There has been a huge fight between them and the Northwestern R. R. Co.

440 Q. In every term of court several condemnation cases?

A. There have been quite a number. I have had charge of only three or four of them.

Q. Have you not, during this time, been acting as the attorney of the Chicago & Evanston railroad in this litigation?

A. Not in all of its business; ever since that time I have been

engaged about some business for that company, and in this controversy with the Northwestern I have been engaged throughout in that matter.

Q. And any of the condemnation cases?

A. No; there are only comparatively few of the condemnation cases I have had anything to do with.

Q. Litigations and bills in chancery attacking the charter and franchise of the road, one in the supreme court and one in the United States court, and in all these pending litigations have you not appeared and been for a great many days and weeks acting as the attorney of the Chicago & Evanston?

A. Yes, sir; in those cases; but they are not now pending in the manner stated. The supreme court has disposed of every case in favor of the Evanston Co. and the litigation in that respect is final.

Q. During any of this time have you been officially the attorney of the Chicago & Evanston?

A. No; I was not.

Q. Or had any official connection with it?

441 A. None whatever. I have been employed as a lawyer in certain cases.

Q. Who has been the attorney of the road?

A. I don't know that it has particularly any attorney; the only lawyer connected with its business I have known about has been Edwin Walker.

Q. He has been associated with you in this litigation?

A. Yes, sir; though I do not know but it has employed some other lawyers in matters where I was not connected.

Q. Was you present when De Koven surrendered this stock and note and papers?

A. No; I was not.

Q. Do you know who was?

A. I only know from information from Mr. Turner that he got them.

Q. Did Mr. De Koven make any inquiries of you in regard to the matter before he delivered them up?

A. Yes, sir; he required me to sign some consent order or something to bind me as well as Turner about it. I signed some paper giving consent.

Q. Did he ask you to get Stickney or anybody representing him to give his consent?

A. I think he did. In some of the first interviews I had with him he thought I had better have a stipulation signed by both parties. I told him I could not get that, in my opinion, and it was not worth while to apply for it.

442 Q. When you returned from the East and Chandler told you Stickney had been there on the 13th of April and said that a few weeks would not make any difference to them as a matter of time did Mr. Chandler say that was in reply to a request from him that he should give you more time?

A. No, sir; he did not.

Q. Did he state how that conversation occurred? What was the occasion of his making the statement?

A. I don't think he did. He said Stickney had been there; that he had been in the office and had made that statement to him. I made no reply to it and never took any action on it one way or the other. At that time I expected to get through with the right of way by the first of June. It was an *ignis fatuus* all the time with me—just a little bit ahead.

Mr. JEWETT:

Q. When in the course of your examination you have spoken of shares of stock or certificates of shares or certificates of stock in the Chicago & Evanston Company to what have you had reference?

A. In one sense, perhaps, there was no stock. The fact was that the stock had been originally subscribed by individuals and no money paid; and these certificates, of the form which is contained in the exhibit here to Hill's deposition of the certificate for 110 shares,

443 were issued from time to time to the persons in whose names stock apparently stood. Those certificates on their face stated that no payments had been made, and upon payment parties would be entitled to a certificate for stock. Those are the only certificates that were issued when I had any connection with the road down to Sept., 1882, and no money down to that time had ever been paid on the stock.

Q. Are those the certificates to which you refer in that connection?

Mr. COLE: Let me ask you how the North Chicago City Railway Co. obtained those shares? It seems from your statement private individuals were the real owners and not the Chicago & Evanston Company?

A. I have already stated that transaction was had by persons before I had any connection with it, and I do not personally know how it was done except what would appear from the papers that they signed, with power of attorney at the bottom authorizing the assignment. Then one would be surrendered and another issued in place of it; that I have seen from time to time done; but when that commenced originally I had no connection with it.

Q. What consideration the individuals holders received you don't know?

A. So far as I know they did not receive anything. They were holding them, within my knowledge, for the North Chicago City R'y Co.

444 After reading the foregoing deposition the witness, W. C. GOUDY, adds to his testimony the following:

I did not ask the North Chicago City Railway Company or its president, Mr. Turner, to extend to me the time for payment of the $25,000 to be paid to said company according to the contract with Stickney of May 28, 1880, nor for consent to extend the time for such payment by Stickney.

Stickney, from information given him by Lowry on May 4th, 1882, and from me by letter, June 5th, 1882, and from the interview with me in person, June 16th, 1882, knew that I had not obtained the right of way, and that I claimed his rights under the contract had ceased because of his failure to pay the $25,000 by July 1, 1881. He did not then nor afterwards at any time before the bill in this case was filed offer to pay the $25,000 or any other sum of money, and no offer has ever been made by him or Hill or any one for them or either of them to pay, unless it be by the bill.

On May 28th, 1882, I heard that Stickney was at the Grand Pacific Hotel in Chicago and I called to see him, but found he had just left for St. Paul. The next day he wrote the letter of May 29, 1882, from St. Paul and sent it to me as a registered letter. I heard *that* several times after the making *on* the contract of May 28, 1880, and before his bill was filed, of Stickney having been in Chicago or passed through Chicago when he did not call to see me or let me
445 know that he was in the city.

Cross-examination by Mr. ELA:

Q. State whether Mr. Easton or Mr. Carey knew of this contract between yourself and Stickney & Company in regard to the sale of the stock and property to Stickney (Exhibit C to the bill) at the time of the negotiations between you and Easton and Carey which resulted in the contract of August 8, 1882.

A. In some one of the interviews had preliminary to the execution of the contract with Easton and Carey or at the time it was made there was some conversation about a contract with Stickney. There is a provision in the contract of Easton and Carey about a certificate for shares of stock that were held by Stickney, and in connection with that fact and proposed efforts to get up the stock there was a statement made by me there had been a contract with Stickney which had expired by its terms, and that I doubted whether I could get the certificate from Stickney, because he was claiming some money under the old contract which had expired. I do not remember exactly who was present, but it is my impression that both Mr. Easton and Mr. Carey were present. The subject of conversation at the time was the procurement of that certificate, and they wished me to get it up, and there was a provision to that effect in the contract, and I expressed some doubt about my ability to get it, and in that connection there was something said about the expired contract.

446 Q. To what contract do you refer by the old contract or the expired contract?

A. The one between Stickney and myself and A. B. Stickney & Co., dated May 28, 1880, which is the only one I ever had with Stickney.

Q. Did Easton and Carey, when you spoke of having difficulty in getting this stock on account of that old contract with Stickney & Co. that somebody claimed to hold or claimed a liability under that contract?

A. All that I can say about that is my recollection is I stated to them that he might not be willing to surrender the certificate unless I paid or refunded him some money that he would probably claim under the contract.

Q. This was during the conversation in August, 1882, which resulted in the contract of August 8th?

A. Yes, sir; I met them first in the latter part of July, not far from the 25th, and the contract was executed on the 8th of August. It was during that period of time.

Q. Before the contract was executed?

A. I am not sure, but it was when the contract was signed; it was in connection with this provision about getting the certificate.

It is understood that Mr. Cole may further cross-examine, if he desires to do so, within ten days.

WILLIAM C. GOUDY.

447 EXHIBIT 1.

Memorandum Between A. B. Stickney, for Himself and Others, and the Chicago & Evanston Railroad Company.

I.

1. The Chicago & Evanston Railroad Company shall furnish its charter, ordinances, references to judicial proceedings, and other matters affecting its title to right of way within the city of Chicago and all facts touching its property to the said Stickney, or to such persons as he shall designate, for examination within 20 days.

2. The said Stickney shall decide whether the title and rights of the Chicago & Evanston Railroad Co. are satisfactory and sufficient to enable a general railway to run on such right of way in the city as far as the Chicago & Pacific depot within 20 days after above information is furnished, and the Chicago and Evanston Railroad Co. shall decide within the same period of time whether the said Stickney and those associated with him who propose to make a contract with the Chicago & Evanston Railroad Co. are pecuniarily responsible and have the ability to perform the proposed contract on their part. In making such decision each party shall be the exclusive judge and exercise a discretion which shall not be reviewable by any other persons or court; and if the said Stickney decide the question to be determined by him in the negative, or if the Chicago
448 & Evanston Railroad Co. decide the question to be determined by it in the negative, then this memorandum shall be null and void and all obligations between the parties hereto shall cease and be at an end.

If both of said parties decide the questions in the affirmative, then an arrangement and contract in suitable and proper form as may be advised by counsel shall be entered into between the said Stickney and his associates and the Chicago & Evanston Railroad Co. to effect the following objects:

II.

1. The Chicago & Evanston Railroad Co. shall proceed immediately to obtain the right of way from the city limits on a route to be selected by it to Calvary cemetery. If any steps are necessary to complete and perfect the right of way in the city of Chicago from the Chicago & Pacific depot northerly such steps shall be immediately taken by the Chicago & Evanston Railroad Co. and such right of way shall be obtained and such steps taken without any unnecessary delay and the said Stickney and his associates shall furnish $20,000 as may be necessary and requested to be used in procuring and perfecting such right of way.

2. The said Stickney and his associates shall complete and put in good running order, under the ordinance of the city of Chicago, a single track within the city of Chicago, and shall construct a
449 line of railway, with side tracks, from the city limits to Calvary cemetery or such point south of it as may be indicated by the Chicago & Evanston Railroad Co., finishing and completing said road in first-class order, with a properly ballasted track, on or before the 1st of October next, using iron rails of a weight of not less than 40 pounds to the yard, and shall equip the same with suitable rolling stock for the operation of a first-class suburban railroad and put in operation thereon not less than 3 locomotives and 10 passenger cars, such rolling stock to be furnished as may be required in the construction of the road, and placing the same in successful operation; and it shall be provided that if the said Stickney and his associates shall be delayed longer than the 1st of July in the finishing of the right of way or by any injunction that the time of such delay shall be added to the period of time in which the road is to be completed, and if such delay runs into the winter, then the time of completion shall be enlarged to the first of June, 1881.

3. The said Stickney and his associates shall pay to the president of the Chicago & Evanston Railroad Co. $5,000.00 on the signing of said contract, and shall also pay $35,000.00 thereafter in monthly installments of $5,000.00 each, provided that when $15,000.00 of said sum of $4–,000.00 has been paid, if the track is not laid from the Chicago & Pacific depot to the city limits, further payments shall be suspended until it is put down.

450 4. When the road shall be complete and the payments herein provided for shall be fully made the Chicago & Evanston Railroad Co. shall execute, issue, and deliver its bonds to the said Stickney and his associates for the amount of money expended by them or such less sum, bearing seven per cent. interest, as they may elect, or instead thereof at least 880 of the 1,000 shares of the stock of said corporation shall be transferred and assigned to the said Stickney and his associates, and immediate control shall be given to them of the directory of said company, the said Stickney and his associates to have the choice of modes.

5. The Chicago & Evanston Railroad Co. shall have the right to fix not more than four stations for stopping or depots, and in case the control of the company is transferred as aforesaid a suitable

contract shall be made with the parties making such transfer or such other persons as they may designate requiring a suitable number of round trips to be run each working day, not less than eight (8), for the term of two years.

6. Provision shall be made for the forfeiture of any money paid or expended by the said Stickney and his associates in case of default in the performance of the contract as a security to the Chicago & Evanston Railroad Co.

7. The Chicago & Evanston R. R. Co. shall furnish satisfactory evidence and security against any indebtedness of said company contracted by it, and it is understood that in procuring and
451 furnishing the right of way said company shall pay all legal and other expenses attending the same.

8. When the final contracts and agreements are made 880 shares of the capital stock shall be transferred and assigned to a trustee to be chosen by the C. & E. R. R. Co., who shall hold it in trust, to be transferred and assigned, as hereinbefore provided, to the said Stickney and his associates or, in case of failure on their part, to be reassigned to such persons as may be designated by the president of the said company.

Chicago, Febr'y 18, 1880.

A. B. STICKNEY,
For Himself and D. M. Sabin & L. P. Hubbard.
THE CHICAGO & EVANSTON R. R. CO.,
By W. C. GOUDY, *Pres't.*

452 EXHIBIT No. 2.

To W. C. Goudy, Esq., pres't Chicago & Evanston R. R. Co.:

You are hereby notified that according to the provisions of a certain contract entered into between the Chicago and Evanston R. R. Co. and the undersigned, dated Feb'y, 1880, that the undersigned has decided that the title and right of the Chicago and Evanston Railroad Company are not satisfactory and sufficient to enable a general railway to run on such right of way in the city as far as the Chicago and Pacific depot, and therefore said contract, by the terms thereof, he considers null and void.

Very respectfully, A. B. STICKNEY.

St. Paul, March 25th, 1880.

453 EXHIBIT No. 3.

Copy.

NATIONAL HOTEL,
WASHINGTON, D. C., *April* —, 1880.

SIR: I am requested by Mr. A. B. Stickney, of St. Paul, to ask you the following questions:

First. Is Mr. Stickney authorized to make a contract with the Chicago & Evanston Railroad Company for certain persons and

himself under the name of A. B. Stickney & Co. so as to legally bind all of them?

Second. Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt?

Third. Have they furnished you their names and authorized you to give the information called for by the two preceding questions?

An immediate answer addressed to me at 162 Washington St., Chicago, will oblige,

Yours respectfully,

(Sig.) W. C. GOUDY.

To the cashier of 1st National Bank of St. Paul.

454 EXHIBIT No. 4.

Copy.

ST. PAUL, MINN., *April 19th*, 1880.

W. C. Goudy, Esq., 162 Washington St., Chicago, Ills.

SIR: Your letter of 15th inst. is received. You ask, first, "Is A. B. Stickney authorized to make a contract with the Chicago & Evanston Railroad Company for certain persons and himself under the name of A. B. Stickney & Co. so as to legally bind all of them?" He is so authorized. I do not know about the use of the name A. B. Stickney "& Co." You ask, second, "Are these persons pecuniarily responsible for from one hundred and fifty to two hundred thousand dollars beyond doubt." They are, beyond any question whatever. You ask, third, "Have they furnished you their names and authorized you to give the information called for by the two preceding questions." Yes; as follows—copy of letter to me dated Ap'l 19, 1880: "We, the undersigned, hereby guarantee the ability of A. B. Stickney to carry out and perform a certain contract with the Chicago & Evanston R. R. Co. mentioned in a letter from W. C. Goudy, dated Washington, D. C., Ap'l 15, 1880." All parties concerned are parties of the highest respectability and are men who will keep any engagement entered into. If the trade is
455 made with Mr. Stickney you can depend upon its being carried out to the letter as agreed.

Resp'y, H. P. UPHAM.

EXHIBIT No. 5.

Copy.

ST. PAUL, MINN., *Oct. 9th*, 1883.

W. C. Goudy, Esq., 162 Washington St., Chicago, Ills.

DEAR SIR: I have found your letter of April 15, 1880, attached to which was the missing letter quoted by me to you 19th April, 1880 (your letter was written from Washington, D. C., on a letter-head of the National Hotel & so got into wrong file).

The signers of the letter are James J. Hill, of this city, and R. B. Angus, now of Montreal.

Resp'y,

(Sig.) HENRY P. UPHAM.

456 EXHIBIT No. 6.

The Western Union Telegraph Company.

Rec'd cor. La Salle & Washington Sts., Chicago, Ill.
Dated Block Island, R. Is'd.

JULY 19, 1880.

To George Chandler, 162 Wash'n St.:

I authorize connection & use road subject revocation at pleasure.

W. C. GOUDY.

EXHIBIT 7.

The Western Union Telegraph Company.

Rec'd cor. La Salle and Washington Sts., Chicago, Ills., July 22, 188–.
Dated St. Paul, Minn., —— 22.

To Geo. Chandler, care Goudy & Chandler, lawyers, Chicago:

Do not quite understand your message, but you are authorized to exercise your own judgment.

A. B. STICKNEY.

457 EXHIBIT 8.

The Western Union Telegraph Company.

(Send the following message subject to the above terms, which are agreed to:)

JULY 21, 1880.

To A. B. Stickney, St. Paul, Minn.:

May we consent to connection of Evanston & Pacific tracks and temporary use of track on Hawthorne avenue; just what we want.

GEORGE CHANDLER.

A. B. Stickney's residence, 31 Smith street.

EXHIBIT 8.

ST. PAUL, MINN., *Dec.* 26, 1880.

W. C. Goudy.

DEAR SIR: I have been so busy all summer that I have had no time to think of Chicago & Evanston. I got the contracts, and the other day I read them over, and I would be pleased to have you inform me what success you have had in getting the right of way which your contract called for.

Truly yours, A. B. STICKNEY.

Ans. Jan. 5, 1881.

Expect to get right — way by 1st March; have had no unexpected obstacles.

458 EXHIBIT 9.

A. B. Stickney's residence, 31 Smith street.

ST. PAUL, MINN., *Jan'y* 3, 1880.

Mess. Goudy & Chandler, Chicago:

About ten days ago I wrote Mr. Goudy requesting information as to how far he had progressed in getting the right of way, &c., for the Chicago & Evanston Co. Not having heard anything in reply, I presume the letter miscarried. Please give me desired information at earliest convenience.

Yours truly, A. B. STICKNEY.

EXHIBIT No. 10.

Private.

Canadian Pacific railway, Western Division; manager's office, A. B. Stickney, manager.

WINNIPEG, MAN., *May 14th*, 1881.

W. C. Goudy, Esq., att'y-at-law, Chicago, Ill.

DEAR SIR: Your letter of 2d inst. is received. I cannot answer you definitely in regard to the matters mentioned therein until I have had time to consult with my friends at St. Paul. I expect to see them next week, and will reply.

Yours very truly, A. B. STICKNEY.

459 EXHIBIT 11.

The Western Union Telegraph Company.

Rec'd cor. La Salle and Washington Sts., Chicago, Ill.
Dated St. Paul, Minn., —— 26.

AUG. 26, 1881.

To W. C. Goudy, 162 Wash'n St.:

Have you got the right-of-way matter all settled so I can go to work on construction at once. Ans.

AL. B. STICKNEY.

EXHIBIT 12.

The Western Union Telegraph Company.

Dated St. Paul, Minn.
Rec'd cor. La Salle and Washington Sts., Chicago, Ill.

AUG. 29, 188–.

To W. C. Goudy, 162 Wash. St.:

No objection to your taking more time to secure right of way, but in that case you must not expect us to commence work until next spring.

A. B. STICKNEY.

460 EXHIBIT No. 12½.

The Grand Pacific Hotel; Jno. B. Drake & Co., proprietors.

CHICAGO, 1.40, —— —, 188–.

DEAR MR. GOUDY: I have been too busy to give matters any particular consideration. Please say to Atkins you will make & arrangement on equitable terms & draw out of him his idea. I will see you this p. m.

A. B. STICKNEY.

EXHIBIT 13.

Copy.

ST. PAUL, MINN., *May* 29, 1882.

Hon. W. C. Goudy, Chicago, Ill.

DEAR SIR: I am in receipt of letters and telegrams from Mr. Lowry saying that you claim that I have forfeited my rights in the Chicago & Evanston R'y.

I am very much surprised at the information, as the delay has been entirely at your request, both verbal and written. Your letters and telegrams I have.

I think I am entitled to some explanation. I would like to hear from you.

Very truly yours, A. B. STICKNEY.

461 EXHIBIT No. 13½.

Copy.

CHICAGO, *June 5th*, 1882.

Mr. A. B. Stickney.

DEAR SIR: Your letter of 29th ult. has been received. I regret that you did not let me know of your being in Chicago the day before the date of your letter. I called at the Pacific Hotel to see you, but found that you had then left.

The contract was made by me as one party and by you and certain other persons as the other party. I learned some time ago from a reliable source that your associates had abandoned all idea of proceeding with the execution of the contract, which by its terms had expired, and your failure to come to Chicago as proposed or to pay any further attention to the matter confirmed the information.

Yet I have not made any arrangement with other parties.

Yours respectfully,

(Sig.) W. C. GOUDY.

462 EXHIBIT 14.

This article of agreement, made and entered into this 28th day of May, 1880, by and between the North Chicago City Railway Company, party of the first part, and William C. Goudy, party of the second part, witnesseth:

That the party of the first part hereby sells and assigns to the party of the second part all the interest it had in the shares of the capital stock of the Chicago and Evanston Railroad Company, being about eight hundred and ninety shares, and also a promissory note or obligation of the Chicago and Evanston Railroad Company to the party of the first part for the sum of thirty-six thousand eight hundred and forty-seven ($36,847.78) dollars and seventy-eight cents, without recourse.

And that the party of the second part agrees to pay to the party of the first part the sum of twenty-five thousand dollars ($25,000) therefor as follows, to wit:

The eight hundred and seventy-five shares of stock shall be assigned to John De Koven as trustee and the said note or obligation shall be assigned and delivered to him as trustee to hold the same until the said sum of twenty-five thousand ($25,000) dollars shall be paid to the said John De Koven as trustee under a contract, of even date herewith, between A. B. Stickney & Co. and the party of the second part or until there shall be default in the payment
463 of the sum of fifteen thousand (15,000) dollars and twenty thousand (20,000) dollars or twenty-five thousand (25,000) dollars, as therein provided.

And it is further agreed by the parties hereto that there shall be paid from the payment of fifteen thousand (15,000) dollars mentioned in the said contract between the said A. B. Stickney & Co. and the party of the second part the sum of twelve thousand five hundred (12,500) dollars, and from the payment of twenty thousand (20,000) dollars mentioned therein the further sum of twelve thousand five hundred (12,500) dollars, making the whole amount of said twenty-five thousand (25,000) dollars.

And in case said payments of fifteen and twenty thousand dollars shall not be made because of the default of the party of the second part and the said A. B. Stickney & Co. shall pay the sum of twenty-five thousand (25,000) dollars in lieu thereof, as provided in said contract, then the whole of said sum of twenty-five thousand (25,000) dollars shall be paid to the party of the first part.

When said payment of twenty-five thousand (25,000) dollars is fully made to the party of the first part all its interest in said stock and note shall cease and be subject to the order and control of the party of the second part.

If the said sum of twenty-five thousand (25,000) dollars shall not be made as aforesaid, then the said shares of stock and evidence of indebtedness shall be assigned and delivered
464 & 465 by the said John De Koven, trustee, to the said party of the first part *of* such person as it shall designate.

The said contract between A. B. Stickney & Co. and the said party of the second part which is deposited with said John De Koven is referred to for greater certainty.

This agreement shall be an order to the said John De Koven, trustee, to pay the sum of twenty-five thousand (25,000) dollars, as aforesaid, to the party of the first part, and in default to assign said eight hundred and seventy-five shares of stock and said note to the party of the first part.

In witness whereof the said party of the first part has executed this contract by its president and secretary and affixed its seal, and the party of the second part has affixed his signature the day and year first above written.

NORTH CHICAGO CITY R'Y CO.,
By V. C. TURNER, *President.*
WILLIAM C. GOUDY.
[L. S.] HIRAM CRAWFORD, *Secretary.*

466 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO & EVANSTON R. R. Co., Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Tuesday, the 2d day of December, A. D. 1884.

Present: Mr. Ela.

E. WALKER, a citizen on behalf of the defendant, being first duly sworn, was examined in chief by Mr. —— and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.
Ans. ——.

467 *The Further Evidence of Mr. Edwin Walker.*

It is stipulated that Mr. Walker and Mr. Easton may be further cross-examined by Mr. Cole, if he desires, on written interrogatories or otherwise, within two weeks.

Since my former examination I have refreshed my recollection relating to some matters referred to by an examination of the exhibits attached to the depositions of Mr. Stickney taken in this cause at St. Paul, and by memoranda which I found in my office. My best recollection now is that shortly after the receipt of Mr. Hill's proposition by Mr. Merrill I was asked for an opinion by the Milwaukee & St. Paul Company of the extent of the interest of the Chicago & Evanston Company in the tracks of the Chicago & Pacific Company laid in the city of Chicago under the ordinance of 1872, and I made an examination of the ordinance and wrote to Mr. Merrill relative to the same. It was some time after this, when he was

in Chicago, that he stated to me that he called my attention to the matter, for the reason that Mr. Hill made some claim to the control of the Chicago & Evanston Company, and claimed that the Chicago & Evanston had equal rights with the Chicago & Pacific in all the tracks of that company, made under the ordinance of 1872, and he then also told me that Mr. Hill offered to sell to the Mil-
468 waukee & St. Paul all his interest in the property of the Chicago & Evanston Company. The letter from Mr. Hill to Mr. Merrill was not shown to me; neither did he show me his own letter in answer to the proposition of Mr. Hill, and I never saw either of those letters until after the commencement of this action. I may have seen a copy of the letter of Mr. Merrill to Hill shortly after the commencement of this action, but I never saw a copy of the letter of Hill to Merrill until after the depositions had been taken in St. Paul.

In the spring of 1882, I should think in the month of May, Jacob Rehm, who stated that he was a director of the North Chicago City Railway Co., called at my office, and, after discussing other matters, told me that the North Chicago City Railway Company owned nearly all of the stock of the Chicago & Evanston Company and controlled its organization, and said that if the Milwaukee & St. Paul desired to purchase it he thought it could do so upon favorable terms.

Afterwards, either during the last days of May or early in June, Mr. Volney C. Turner also called at the office and repeated the same statement in substance, but said that he was not prepared to make a proposition for a short time, but would do so if the Milwaukee & St. Paul desired to purchase. I told him that the Milwaukee
469 & St. Paul Company had determined not to purchase the property or take any interest in it. I do not remember that my attention was called to the matter after this until early in August of the same year, when Mr. J. C. Easton and Mr. John W. Carey called, together with Mr. Goudy, and stated they had come for the purpose of negotiating the purchase of the stock of the Chicago & Evanston Railway Company, and it resulted in the contract which was entered into between those two gentlemen and Mr. Goudy.

I do not remember that at that time I made any examination of the records of the Chicago & Evanston Company or of its charter or of its ordinances prior to that time. I had examined its charter and had examined the ordinances for the purpose of giving an opinion to the Milwaukee & St. Paul Company of the extent of its franchises under its charter and under the ordinances that had been granted by the city. I did not at that time represent either Mr. Easton or Mr. Carey as an attorney in the purchase of this property, nor do I remember that my opinion was asked as to its value or any other matter connected with the transfer. Mr. Carey acted upon his own judgment, so far as I know, and also advised Mr. Easton.

Shortly after the execution of the contract, I think in the early part of September, I was made a director of the Chicago & Evanston Company, and was also retained as its counsel and solicitor,

470 which position I have held from that time until the present time.

Referring to the evidence of Mr. Goudy relative to the contract made between himself as president of the Chicago & Evanston Company and the Chicago & Pacific Company settling the rights of each company to the tracks laid on Hawthorne Ave., and also to the contract for the use of about 1,500 feet, extending from the present junction of the Chicago & Pacific with the tracks on Hawthorn Ave. to a point near Southport avenue, I said that I was the president at that time of the Chicago & Pacific Company and executed each of those contracts; that I had not at that date or at the time of the making of either contract any knowledge of any contract of Stickney & Company or of any claim that they made to the stock of the company, nor do I remember that I had ever heard of the firm until after the contract between Goudy and Easton. I might have so heard, but do not recollect it, nor had I any knowledge whatever of any claim of the complainant in this action, save what Mr. Merrill had told me some time in the spring of 1882.

In September, 1882, after I had become a director of the Chicago & Evanston Company and its solicitor, and about the time of the filing of this bill, I heard of the claim of Mr. Hill, and I think it was presented through his attorney or spoken of by his attorneys
471 resident in Chicago. The contract, however, I think I never saw until the filing of this bill, and made an examination of the copy attached to the bill.

Examination by Mr. ELA:

Q. When did I understand was the first time you heard of the claim of the complainant or Stickney & Co.?

A. It was after February, 1882, but the date I have no means of fixing. I was informed by Mr. Merrill, as I have already stated, of the letter received from Hill and the answer that he had sent in reply.

Q. Did you have considerable conversation with Merrill at that time?

A. Not about this property.

Q. When did you first have a conversation with Mr. Goudy?

A. I can't remember the date. I can only say that in the conversation with Mr. Goudy I informed him of what Mr. Merrill had told me, that Mr. Hill was trying to sell to the Milwaukee & St. Paul the stock of the Chicago & Evanston—the control of that company.

Q. Was that during the time that Mr. Goudy was attempting to negotiate with you for the sale of the same stock to the Milwaukee & St. Paul road?

A. I can't state whether that conversation occurred prior to our visit to Milwaukee or afterwards; it was not far from those dates.

472 Q. When was it that you went to Milwaukee with Mr. Goudy?

A. Mr. Goudy has fixed the time definitely in his deposition. I

don't remember the dates. I made no memoranda. I have nothing to show just when we made that visit. I will state further, in the same connection, that I paid but very little attention to the matter for the reason that I had been advised by Mr. Merrill and Mr. Mitchell that they would have nothing to do with the purchase of the property.

Q. Was this visit to Milwaukee, as near as you can recollect, soon after you had been informed of Mr. Hill's claim by Mr. Merrill?

A. I would rather not undertake to fix the date.

Q. Did Mr. Goudy state this in his testimony, as you recollect it?

A. I presume it is stated. I did not hear Mr. Goudy's evidence upon that matter. I only know he said to me that he had letters and memoranda that would enable him to fix the date of our visit to Milwaukee.

Q. Did you go there with him more than once on that business?

A. I think we were there twice.

Q. How soon was the second time after the first, if you recollect?

A. Not very long after the first.

Q. Were both times before June, 1882?

A. Yes; I think it was.

Q. What were the objects of these visits?

473 A. Mr. Goudy came to me for the purpose of getting me to submit the proposition to Mr. Merrill and Mr. Mitchell for the purchase of the stock of the Chicago & Evanston Railroad Company.

I wish to say, in this connection, that in all the interviews I had with Mr. Goudy and in all the discussions that we had at Milwaukee I always understood that the capital stock of the Chicago & Evanston had been issued, and never discovered that no stock had been issued until after I became an officer of the company, and then for the first time I saw that these certificates were mere certificates for stock instead of being certificates of capital stock. I made an appointment with Mr. Merrill or rather asked him to fix a day when he could meet Mr. Goudy and myself at Milwaukee, and we went there for the purpose of submitting this proposition, or rather for the purpose of enabling Mr. Goudy to submit the proposition to Mr. Merrill and Mitchell.

Q. Who was Mr. Goudy acting for at that time, himself or somebody else?

A. Mr. Goudy claimed to have the control of over 800 shares of the capital stock and the authority to transfer that stock if they could agree upon the amount of compensation. He did not state whom he represented, but I inferred from what he did say that he represented his own personal interests and the interests of others in that property or the stock of that company.

474 Q. How much of an interval was there between the last time you went to Milwaukee with Mr. Goudy and the time that Easton and Goudy and Mr. Carey came into your office, as you state?

A. If our second visit to Milwaukee was early in June or in the month of June, then there was an interval between that date and

the 8th of August. I saw that the contract between Easton, Carey, and Goudy was dated the 8th of August.

Q. In the course of the negotiation between Mr. Goudy and the Milwaukee & St. Paul did not Mr. Goudy meet Mr. Easton or Carey in connection with this negotiation?

A. He did not meet Mr. Easton, and my recollection is that Mr. Carey was not present. I know he was not consulted in regard to the matter while I was there.

Q. Do you know what was the occasion of Mr. Easton or Mr. Carey approaching Mr. Goudy in regard to the matter?

A. I do not.

Q. Can you remember any of the conversation in regard to the Chicago & Evanston road that took place between you and Mr. Merrill at the time he called at your office after having written the letter to Mr. Hill?

A. I do not remember the conversation. We had but very little conversation about it. I only know that Mr. Merrill gave the matter a good deal of attention and consideration, but the

475 whole question was referred to Mr. Mitchell, and, as Mr. Merrill said to me, Mr. Mitchell refused absolutely to have anything to do with the road. He abandoned it so far as the Milwaukee & St. Paul were concerned.

Q. When Mr. Turner called and spoke about the sale of the Chicago & Evanston to the Milwaukee & St. Paul was that before or after Mr. Merrill had this conversation with you?

A. I don't remember. I can't fix those dates.

Q. Do you remember the last talk you had with Mr. Goudy in regard to this matter of the sale of stock previous to the making of the contract of August, with Mr. Easton?

A. I don't remember the last conversation we had. I know that for some months Mr. Goudy and I had great many conversations about that property, and he represented that the property or stock was for sale, and was anxious to sell it and anxious to have the road built, and I know that the property was on the market simply from what he told me, and whenever we would meet we would speak of that property. I perhaps would ask him how he was getting along with selling it. I was more especially interested in the road on account of its having an equal interest in Hawthorne Ave., in the track that had been laid there with the Milwaukee & St. Paul Co., in the tracks laid there on Hawthorne avenue, and, of course, we felt interested in knowing where the property was to go—into whose hands it would ultimately fall.

476 Q. Did you have a conversation with him in regard to the matter within a few days previous to the 8th of August, 1882?

A. I might have done so. My recollection now is I was requested by some person—I can't state who, I should think very likely by Mr. Carey—to make an appointment with Mr. Goudy to meet these gentlemen at my office on a day that was named for the purpose of considering the purchase of the Chicago & Evanston railroad stock, and I very likely, when I communicated that to Mr. Goudy, had

some discussion with him about it, but I don't remember what was said at all.

Q. Then the conversations with Mr. Goudy continued at intervals up to about August, 1882?

A. They might and might not. I can't state how often we spoke of the matter.

Q. During that time did Mr. Goudy claim to have the control of this stock?

A. He did.

Q. What conversation did you have with Mr. Carey previous to the meeting on the 8th of August?

A. I don't think I had any conversation at all with Mr. Carey with reference to the matter until he came to the office on the 8th of August, or about that time, when he came there with Mr. Easton and Mr. Goudy; my recollection is that I never had any conversation with Mr. Carey until that time about the matter.

477 Q. You speak of a time when he had an appointment or when they all met at the office?

A. I spoke of the time when they met.

Q. That you had a talk with them about the object of the meeting and at the time the appointment was made?

A. With whom?

Q. Carey.

A. Oh, no; I didn't see Carey. From some source I knew of the object of the meeting, but I can't state now my source of information.

Q. Do you remember what conversation you had with Easton previous to that time?

A. I never met Mr. Easton in my life until that day. That was the first time I ever met him.

Q. Did you understand this meeting on the 8th of August to be the result of a series of meetings previously held between the parties?

A. No; I understood that to be the first meeting between the parties.

Q. Then they made their contract the first time they met, did they?

A. I didn't say that the contract was reduced to writing. They discussed the matter—went over it very thoroughly—at that time. Whether the contract was closed at that meeting or the next day or the day after or several days after I do not remember.

Q. I thought that was the day it bore date?

478 A. Not the date of the meeting. The contract is dated the 8th of August.

Q. I thought you fixed the meeting on that date?

A. I do not mean to be so understood—that the first meeting was held on the 8th day of August. I mean that the contract was executed and bears date the 8th of August.

Q. About how long, according to your recollection, was the first meeting previous to the 8th of August?

A. I have no recollection at all. Mr. Easton will be able to state that, Mr. Ela.

Q. I will ask you, as near as you recollect, how long was it after this conversation with Mr. Merrill in your office that you first talked with Mr. Goudy in regard to this matter.

Q. Well, I can't state whether my first interview with Mr. Goudy was prior or subsequent to my interview with Mr. Merrill in my office.

Q. Did Rehm and Turner at the interviews you speak of with them say that Goudy had the control of this stock?

A. No; they didn't say that he had the control of the stock. They said that he was trying to negotiate the sale of the stock, and they would give him some further time to make his negotiations, and I replied that if Mr. Goudy thought he could make a negotiation that it was not necessary to report any matter or submit any
479 proposition until after Mr. Goudy was through with his negotiations.

Q. The interviews with Rehm and Turner were after the interview with Mr. Merrill in your office you speak of, were they not?

A. I think they were; that would be my recollection?

Q. You say you told them that the Milwaukee & St. Paul had determined not to purchase; so I suppose it was after that interview.

A. I think I told them that the Milwaukee & St. Paul had concluded not to purchase at the figures submitted by Goudy; whether they would consider any other proposition or not I could not say. I only know that they gave me to understand that they could dispose of some eight hundred odd shares at much less *that* Goudy asked for the same property.

Q. Then Mr. Goudy had commenced his negotiations with the Milwaukee & St. Paul Company before these interviews?

A. That is my recollection.

Q. Were you present at all the negotiations between Mr. Goudy and Mr. Easton and Mr. Carey after the one you speak of at your office up to the time the contract was completed?

A. No. I was not.

Q. At how many of them were you present?

A. I think after they called at my office I went to the adjoining office—room 8—and I was in and out of that room several
480 times during the conference. I took no part in it; was not there all the time; how much of the time I can't state.

Q. The negotiations from that time on took place in your office, did they not?

A. In room 8, adjoining my office.

Q. Whose room was that?

A. I- was a room that was used by myself a good deal. It was the room that was occupied as the office of the Milwaukee & St. Paul Co., and when Mr. Merrill was here he occupied the room. I used the room, I suppose, more than anybody else at that time. Afterwards Mr. Easton came here and commenced the construction of the road. They used that office as the office of the Chicago &

Evanston. Two or three railroad companies made that their principal office.

Q. Since the purchase of the stock that same room has been used as the office of the Chicago & Evanston?

A. Partly.

Q. It is now so used?

A. It is in part, not wholly, I believe.

Q. Was Mr. Carey at that time the general solicitor of the Milwaukee & St. Paul road?

A. Yes, sir.

Q. Who drew the contract which was signed between them as the result of these negotiations?

A. I don't know. I should say it was drawn at Mr. Goudy's office, but I don't know.

Q. What did you have to do with the deposit of the papers in the Commercial Nat'l Bank?

481 A. Personally I had nothing to do with it.

Q. How happened your name to be put on the envelope as one of the parties to whom the papers were to be delivered?

A. Well, it was never fully explained to me. My recollection is that that deposit was made under some arrangement with Mr. Volney C. Turner, Mr. Easton, and Mr. Goudy. Why my name was put on the envelope I do not know. I don't think I was present when that arrangement was made. I am certain I did not direct it. At whose suggestion my name was used I cannot state.

Q. Was Mr. Goudy acquainted with either Mr. Easton or Mr. Carey before these negotiations commenced, so far as you know?

A. He was not acquainted with Easton, and whether he had personally met Mr. Carey before or not I cannot state. I think I introduced Mr. Easton to Mr. Goudy on the morning of their conference. I imagine that Mr. Carey and Mr. Goudy had had an acquaintance—both old lawyers and good Democrats.

Q. During these negotiations, Mr. Carey being the general solicitor of the Milwaukee & St. Paul road, as you say, were you the solicitor in Chicago for the same road under the direction of Mr. Carey?

A. Well, yes; I can assume that I was under the direction of Mr. Carey, but more especially under the direction of Mr. Mitchell and Mr. Merrill.

482 Q. When did you negotiate in regard to your interest in the Chicago & Evanston road?

A. I never had any interest in that except as solicitor. I held one share of stock for the purpose of qualifying me as a director, but the only interest that I have is in its litigation and the fees I get out of the litigation.

Q. You held you- share of stock and directorship for Mr. Easton and Mr. Carey, or you did at that time?

A. No, sir; Mr. Carey never requested me to hold any office in the company. I was made a director, I imagine, for the reason that the statute requires a majority of the directors to be residents of this State.

Q. Did you commence to have an interest in the road immediately upon the purchase?

A. I became a director, I think, about the 4th of September following. Some one of the old directors of the Chicago & Evanston resigned, and I was appointed by the board to fill the vacancy. It continued that way until the first annual election of stockholders of the Chicago & Evanston Company, and I was then elected a director.

Q. Did Mr. Easton spend his time in Chicago from the time of this purchase until the commencement of the transactions after the road was purchased?

A. A great deal of his time was spent in Chicago. As soon as they got the organization completed they immediately commenced procuring the right of way, commencing the construction of
483 the road first on Southport Ave., and then through the town of Lakeview.

Q. In his absence did you represent him?

A. I represented the company in all matters of a legal character. I never represented Mr. Easton personally.

Q. You have had the general management of the construction since the purchase of the stock, haven't you?

A. I have had nothing to do with the construction of the road, except that I have been consulted as to the location of the tracks and the line generally.

Q. Well, with the reorganization—the financial part?

A. The company; not with the financial part. The company has acted under my advice in all matters affecting the organization of the company and under my advice at the election—general matters which would naturally belong to the office of the attorney of the company and with its policy; but in regard to money I have had no more to do with that than any director would have.

Q. They have acted under your advice in the meetings of stockholders and directors as to matters of election of officers and calls for payments of stock, increase of stock, &c.?

A. I don't know that they have acted under my advice, particularly when—at the first meeting of the board after August the matter was then taken up as to the rights of parties holding these certificates for stock, and I did advise the company of its rights
484 in regard to that matter. I advised the company that these were mere options on the part of parties holding them; that they had a right to call for payment of the entire amount of stock represented by these certificates for the purpose of providing funds for the construction of the road. So far as the election of directors was concerned at the annual meeting of the stockholders, that was regulated by the by-laws of the company, the code of which was adopted by the directors as soon as we got the company organized on a working basis.

Q. Were you not acting for Mr. Easton or the parties who purchased this stock in regard to the payments to Mr. Goudy or what money he was to receive under the arrangement?

A. I think not. I understood that the payments were provided

for in the contract which was entered into between those three parties.

Q. Did not Mr. Goudy have consultations with you in regard to payments of some of that money after the contract was made?

A. Mr. Goudy would come to me when he wanted a payment on the contract if Mr. Easton was not in the city, and he would talk with me in that way.

Q. Talk with you as the representative of Mr. Easton?

A. No, sir; talked with me as attorney of the company—as an officer of the company. I never represented Mr. Easton per-
485 sonally in any matter. He was the president of the company and I was the solicitor of the company, and so far as I was consulted at all by Mr. Easton it was with reference to the interests of the railroad company and in reference to his personal interests. I don't know that he had any separate personal interests; I don't know but he had.

Q. At the time of your settlement with Mr. Goudy of the matters between the Chicago & Pacific and the Chicago & Evanston what did Mr. Goudy tell you about the arrangements for the sale of the road or for the construction of the road?

A. At that time there was not one word said about the sale of this property or about the completion of the road, except that he may have said that he intended some time to get the road built as far as Evanston. He might have said that and might not. There was nothing said at the time about the sale of the property.

Q. Didn't he give you to understand that the reason why he was getting this matter closed was because he was expecting to have the road completed by some parties?

A. I don't remember that he made any reference to it at all—to any sale. I know that he said that moneys had been advanced by Mr. Turner or by the North Chicago City R'y Co. and they wanted the matter adjusted.

Q. Did Merrill tell you that Hill claimed to own the stock?

486 A. He told me that Hill claimed that he either owned the stock or that he could sell the stock to him, and that he made an offer to sell it, but that Mr. Mitchell had declined it. He did not show me the correspondence at all.

Q. You spoke of an interest of the Milwaukee & St. Paul Co. in the tracks on Hawthorne Ave. What interest did they have in those tracks?

A. On Hawthorne Ave. the Milwaukee & St. Paul, as lessee of the Chicago & Pacific Company, has an half interest in the tracks on Hawthorne Ave.

Q. Was the Chicago & Pacific road purchased in the interest of the Milwaukee & St. Paul?

A. No, sir.

Q. Was it immediately or soon after the purchase leased to the Milwaukee & St. Paul?

A. What purchase do you refer to?

Q. The purchase by the present owners of the stock.

A. It never was purchased by the present owners.

Q. Well, the controlling interest of the stock.

A. In the Chicago & Pacific?

Q. Yes.

A. Well, the lease was made in the usual way by a vote of the stockholders of the Chicago & Pacific and was accepted by the Milwaukee & St. Paul Co.

Q. Who were the officers of the Chicago & Pacific who negotiated that lease?

A. I negotiated it. I signed it as president. I forget now who the other officers were.

Q. Were they all large stockholders in the Milwaukee & St. Paul Company?

487 A. Those that executed that lease?

Q. Yes, and the officers of the Chicago & Pacific?

A. No, sir; they held no stock in the Chicago, Milwaukee & St. Paul; did not at that time. I am still president of the Chicago & Pacific. I am not a stockholder in the Chicago, Milwaukee & St. Paul.

Q. Do you remember who the directors are of the Chicago & Pacific?

A. At the present time?

Q. Yes.

A. I do not remember all of them. Some of them are directors of the Milwaukee & St. Paul and others are not.

Q. Was that the case at the time the lease was made?

A. No, sir; the majority of the directors of the Chicago & Pacific Company are residents of this State, and my recollection is that they are not even now stockholders of the Chicago, Milwaukee & St. Paul.

Q. Was it not your understanding that the control of the Chicago & Pacific road was purchased in the interest of the Milwaukee & St. Paul in order to make this lease?

A. Before the lease was made?

Q. Yes.

A. I should say that a majority of the stock was held in the interest of the Milwaukee & St. Paul at the time the lease was made. I think I voted on that lease a majority of the stock.

488 Q. And the purchase of that stock was made for the purpose of enabling the Milwaukee & St. Paul to make a lease of that nature?

A. There is a very long story connected with that. I cannot give my statement of it in piece-meal. There is nothing I wish to conceal.

Q. The entrance to the city—inside the city limits—for a considerable distance of the Chicago & Evanston road was over this track of the Chicago & Pacific road, in which it had a joint interest, was it not?

A. I think there is about a mile of the track there, perhaps a little more, from Larrabee St., where the Chicago & Pacific turns and goes west, near the rolling mills.

Q. Since the Chicago & Evanston has been operated at all under

the present arrangement have they been using the track on Hawthorne Ave.?

A. I think they have.

Q. Do not the construction trains and such other trains as are run by the Chicago & Evanston go out of the Chicago, Milwaukee & St. Paul depot and connect with the track of the Chicago & Evanston at the junction of that track with the Chicago, Milwaukee & St. Paul?

A. No. I don't think the trains run from the Union depot on the West Side. How far they connect with the Milwaukee & St. Paul tracks or how far the Evanston Company makes use of the St. Paul tracks I can't state.

489 Q. Is not the depot, the station, at the end of the joint track on Hawthorne Ave. been discontinued—the use of it?

A. It was discontinued several years ago; it was discontinued when the Chicago & St. Paul passenger trains were run. After the lease was executed they used the Milwaukee & St. Paul depot instead of the one on Larrabee St.

Q. Is not that the same in regard to the Chicago & Evanston trains?

A. The use of the tracks?

Q. Yes.

A. They use the tracks constantly. They run a local train from Larrabee St. down round the city to the new depot on the West Side, and run freight cars down there and transact more or less business on the tracks on Hawthorne Ave.

Q. What trains run on Hawthorne Ave.?

A. They run passenger trains—the Milwaukee & St. Paul—and run freight cars for the delivery of freight.

Q. On Hawthorne Ave.?

A. Yes.

Q. Are they running passenger trains there now?

A. I understand they are. They run a train there twice a day. I think it is a local train, accommodation, and runs clear round the city belt line.

Q. Do they run on Hawthorne Ave. and up out to the city limits on the Evanston track?

490 A. It does not run any passenger trains at all. They tried it for a short time and soon after abandoned it.

Q. When those passenger trains were run where did they start from?

A. I think those passenger trains, under some contract with the Milwaukee & St. Paul, started from their depot and swung around.

Q. Did all the trains start from the depot on the West Side?

A. Yes. It was tried as an experiment to see if it would accommodate the people at all or do any business, but it was found that the people did not patronize the train, and it was taken off.

Q. Then all the trains that have been run by the Chicago & Evanston road have started from the Milwaukee & St. Paul depot on the West Side and run on their track to the junction of the Chicago & Evanston?

A. No. During the time that the Chicago & Evanston run its passenger trains as far north as Calvary cemetery, perhaps a little beyond, for thirty or sixty days, that passenger train started from the Union depot on the West Side. The only other trains that the Chicago & Evanston run have been construction trains; and at all times they hauled some freight—building material for people on the line of the road north of the city limits. Those trains do not start from the St. Paul depot, as I understand it. When they have had freight to deliver up there it has been delivered on the
491 Chicago & Evanston line by some other company, probably the St. Paul, and taken to the engine of the Chicago & Evanston and hauled up there.

Q. How about the construction trains?

A. The construction trains have been run for a long time by the engines of the Chicago & Evanston Company.

Q. And not by the engines of the St. Paul Company?

A. I can't tell you. Mr. Easton can tell you more about that than I can.

Q. Where do those construction trains start from?

A. I can't tell you.

Q. What contract is there or has there been between the Chicago & Evanston and the Milwaukee & St. Paul in regard to running those trains and the use of depots, tracks, and cars?

A. I don't know what the arrangement was. It was not made by me.

Q. Have you any record of any contract?

A. I presume there is no record, for the reason there has been no permanent contract. If they made any contract at all it was of a temporary character.

Q. Do you know that there was any contract made?

A. I do not, sir.

Q. Whose cars were used at the time the passenger train was run?

A. I don't know.

Q. Did the Chicago & Evanston own any passenger cars?

A. They owned some rolling stock. I don't know whether
492 they owned any passenger coaches or not.

Q. Didn't you understand that they were the cars of the St. Paul they run when they ran passenger trains on the Evanston road?

A. My recollection is that it was under a contract with the Chicago & Evanston. Under that contract the Chicago & Evanston paid for the use of the cars.

Q. You said you did not know of any such contract?

A. I said that was my understanding, and I say this positively, that the Chicago, Milwaukee & St. Paul has not run any trains of any kind or character over the Chicago & Evanston railroad except where they have had a joint interest in the track.

Q. I asked you in regard to any contract as to the running of cars, the use of tracks, and the use of depots between the two roads, and I understood you to say you knew of no contract.

A. I knew of no contract. I gave you my understanding in regard to another question you asked me, and you were not satisfied with my answer when I said I did not know what the arrangement was. In answer to a subsequent question I told you what my understanding was.

Q. Do you now know of any contract in relation to that matter?

A. I do not know what the contract was.

Q. Do you know whether there was one?

A. Whether there was a contract?

Q. Yes.

493 A. I think I can safely say there was a contract, or else cars would not have been run in that way.

Q. Do you not know of your own knowledge?

A. I have told you over and over again.

Q. Do you know whether the St. Paul has been paid anything on that account?

A. The Milwaukee & St. Paul have been paid for their services that have been rendered—construction of road or use of cars or anything else.

Q. I ask you in regard to this specific matter.

A. I know nothing about that.

The WITNESS: I have stated that at a certain date I had never heard of Stickney & Company. I think I stated when I first had knowledge of Stickney & Company and the contracts. I said further that after August, and probably in the month of September, after I became a director of the Chicago & Evanston Company, I examined the records of that company, and in that book of records I found a copy of the contract made between Stickney & Co. and the Chicago & Evanston Company for the construction of this road. I think that contract is made an exhibit, and it is also enrolled upon the records of the Chicago & Evanston Company. I saw it in those records; just when I cannot now state, but I think it was after I became a director of the company.

Q. You spoke of examining the ordinances in regard to this road and the charter when Mr. Merrill communicated with you

494 first. Where did you go to get your information in regard to them?

A. I did not go out of my own office. I had the charter and the ordinance in a bound volume of ordinances.

Q. Do you remember further conversations with Mr. Goudy before that time in regard to these matters?

A. I don't remember whether it was preceding the time or whether it was shortly after the time I had a conversation with Mr. Goudy.

Q. Did you have some conversation with him then in regard to what had been done under the charter ordinance?

A. No, sir. I knew what had been done, because I had settled with the — interests in Hawthorne Ave.

Q. Do you remember whether or not you did have talks with Mr. Goudy in regard to matters about that time?

A. What matters do you mean?

Q. In regard to the road at all.

A. Oh, I had had conversations with Mr. Goudy. I had several, but it was very far from that date.

Q. In regard to what he claimed the rights of the Chicago & Evanston Company were the franchises?

A. I don't know that he stated anything about its franchises or powers it might get from the charter. He stated first as to the amount of stock issued; represented that the stock had been issued
495 and the amount he could control and sell, and probably said something about the condition of the right of way.

496 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO & EVANSTON ——, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Tuesday, the 2d day of Dec., A. D. 1884.

Present: Mr. Walker, Mr. Goudy.

J. C. EASTON, a witness on behalf of the defendant-, being first duly sworn, was examined in chief by Mr. WALKER, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. J. C. Easton; residence, La Crosse, Wisconsin.

Q. Are you an officer of the Chicago & Evanston Railroad Company?

A. I am.

Q. What office do you hold?

A. President.

Q. How long have you held that office?

A. Since the reorganization, after the purchase of Mr.
497 Goudy?

Q. Are you acquainted with Wm. C. Goudy?

A. I am.

Q. When did you first become acquainted with him?

A. About the time of making the contract; perhaps a day or two before.

Q. What contract do you refer to?

A. The contract by which Mr. Carey and myself purchased the control of the stock of the company—the Chicago & Evanston railroad.

Q. Is that contract in writing?

A. It is.

Q. Look at the paper now shown you and state if that is the original contract.

A. That is the original deed.

Mr. WALKER: I will offer a copy of this contract in evidence.

Q. Will you now state what negotiations with Goudy led to this contract?

A. A short time before that contract was made I came to Chicago with Mr. Carey and met Mr. Goudy in room 8, adjoining Walker & Carter's office, and negotiated for the purchase of the control of the Chicago & Evanston stock, which finally resulted in the purchase and the making of that contract.

Q. Had you met Mr. Goudy before that time?

A. I think I never saw him before.

Q. Had you met me before that time?

A. I had never seen you before.

498 Q. You may state whether at the time that contract was executed—at the time of these negotiations, while they were pending with Mr. Goudy—I acted as your attorney or the attorney of Carey or represented you as such in that negotiation.

A. You did not.

Q. When did I first become connected with the matter as attorney or in any other capacity?

A. You became connected with the company as director shortly after that contract—after the reorganization. You was also employed as solicitor of the company some time subsequent to the making of that contract; probably after you became a director or about that time.

Q. At the time this contract was executed or at any time during the pendency of the negotiation were the records of the Chicago & Evanston Railway Company submitted to you for your inspection?

A. They were not.

Q. Do you remember when you first saw those records?

A. I think after we had completed our contract or bargain, perhaps, verbally. Mr. Goudy brought the books of records of the company and Mr. Carey took them with him to make an examination to see that everything was in order. Then, when he made his report that he found nothing out of the way, then we entered into this contract and I made a payment. I do not think I ever examined those records personally. I took Mr. Carter's (Carey's) report that they were in order.

499 Q. At the time of the execution of this contract of August 8 or at any time previous thereto what knowledge, if any, had you of the claim of complainant Hill or of Stickney & Co. or of the contract entered into between Goudy and Stickney & Co.?

A. I had no knowledge or information whatever.

Q. Had you ever heard of such a contract?

A. I never had the least intimation and never saw any paper that would give me any information on the subject, directly or indirectly.

Q. Do you remember when you first had knowledge Hill claimed certain rights or interest under the Goudy contract?

A. I don't think I ever had any knowledge of Hill's having any claim until this suit was commenced. I had knowledge of the transfer of stock. Most of it came from V. C. Turner or the North Chicago City Railway Company, a few came from Mr. Goudy, and a few

from some other directors. There were 110⅔ shares in the name of A. B. Stickney, of St. Paul, a few shares in the name of a law firm of Ela and somebody else, and also of some of the old directors which Mr. Goudy said he would get for us, but he did not do so. We held back some of the payments, perhaps. I don't know why we didn't get them.

Q. When did you first learn that no capital stock had been issued by the Chicago & Evanston Company, or when did you learn,
500 if at all, the difference between the outstanding certificates and certificates of capital stock?

A. I think the time we were negotiating it was spoken of as stock. When we came to see the actual stock itself it was in the form of subscription—a certificate entitling the holder to stock upon payment of the par value thereof. I don't think it was mentioned that that was disclosed until we had got some way into the negotiation—perhaps until we came to the closing and delivery. I would not be quite certain as to that. It was not in the start.

Q. You are a director, I believe, of the Chicago, Milwaukee & St. Paul railroad?

A. I am.

Q. What interest, if any, had that company, either directly or indirectly, at the time of the negotiations, in the contract between yourself, Mr. Carey, and Mr. Goudy?

A. None whatever.

Q. What interest has that company at the present time or has it ever had in the stock of the Chicago & Evanston Company or in the building of that road?

A. None whatever.

Q. When did the Chicago & Evanston Company begin the construction of the road and where, and how soon after this contract?

A. Immediately after—very shortly after.

Q. What part of the line was first constructed?

A. From Hawthorne avenue through Southport avenue, through the city limits.

Q. And then from the city limits to what point?

501 A. Then about a mile and a half in Lake View up to beyond Graceland cemetery.

Q. Do you remember how much of this road had been constructed before the filing of this bill, which was filed in November?

A. It had been constructed to the city limits and perhaps further, but certainly to the city limits.

Q. Do you remember when the track was laid past Graceland cemetery?

A. Probably during the winter of 1883; perhaps in the early part—January or February; possibly in December.

Q. State whether the Chicago, Milwaukee & St. Paul constructed any part of the road; and, if so, under what arrangement.

A. They never constructed a foot of it. I have no personal knowledge of it, but before the Hawthorne-avenue track was built or owned jointly by the Chicago & Pacific and Chicago & Evanston and had been leased the Chicago & Evanston portion of the track

had been leased to the Chicago, Milwaukee & St. Paul by Mr. Goudy, while he was president of the road. Mr. Goudy, when he sold to us, said that the road was constructed to the city limits, but it had long been disused up Southport avenue, and the track was covered with dirt, and possibly some of the track was not there. He was not sure if it was there or not. We had to reconstruct it in Southport avenue, which was done shortly after we acquired it.

502 Q. Were any of the cars, engines, and tools of the Chicago & St. Paul *were* used in the construction of the Chicago & Evanston road; and, if so, under what arrangement?

A. The Chicago & Evanston had no rolling stock or tools of any kind. I think, at the time of our purchase—I purchased about the 1st of October following—*the* purchased an engine and 20 freight cars, and also purchased some tools, as we needed them. Then I hired from the Milwaukee & St. Paul an engine at $15 a day, I think it was, and paid for it. I paid them for the use of their tools and whatever the actual cost was for constructing the road in Southport avenue, constructing the track, and 10% additional for the use of their tools. When we got our own engine we paid them $1 a day for housing the engine, as we had no round-house—so much a day for the water, so much a day for their watching and looking after it—and whenever we had any of their men and tools we paid them their *per diem* and 10% over and above what they paid to the men. At one time when our engine broke down we hired their engine beyond the city limits, and paid them at the rate of $15 a day, I think.

Q. Did that include engineer and fireman?

A. I think it did. When we used their engine we didn't pay for the housing of that, we paid for the fuel.

Q. How far is the road constructed at the present time?

A. To Calvary cemetery.

503 Q. About how many miles?

A. About eight or nine miles.

Q. Have regular trains been run over the road at any time, or any portion of it?

A. We tried the experiment of running a passenger train which run from the Union depot over the St. Paul track until it struck our track, and then over our track through Lake View, but found that it did not pay. For the purpose of running that train, as we had no passenger coaches, we hired three coaches of the St. Paul Company for $5 or $10 a day. It took the receipts to pay the expenses for the trip. We found it didn't pay, and then we abandoned it. Since that time we have run only a construction train except on a few occasions. We run, I think on Decoration Day, an excursion train to Graceland, and for the purpose of running that we hired cars from the Milwaukee & St. Paul and paid them rent. We have never had anything of the Milwaukee & St. Paul that we didn't pay the same as we would have to pay any other company, and paid them in cash, either for construction or for passenger service.

Q. You have already said that the Milwaukee & St. Paul Com-

pany have no possible interest in this road or any property belonging to the Chicago & Evanston Company; you may state whether Mr. Alexander Mitchell or Mr. S. S. Merrill have any interest as stockholders or otherwise.

504 A. Not a dollar's interest, either one, in the company.

Q. State whether Mr. Merrill was at one time elected a director.

A. We elected him a director and he refused to accept; offered him a share of stock which he refused to pay for.

Cross-examination by Mr. ELA:

Q. Who first brought to you- attention the fact that Mr. Goudy wanted to sell this stock?

A. Mr. Wadsworth, of New York.

Q. Do you know when that was?

A. It must have been about the time I came here and purchased it.

Q. What business was Mr. Wadsworth engaged in?

A. Mr. Wadsworth is director and vice-president of the Milwaukee & St. Paul railroad.

Q. Did he tell you there had been negotiations between that road and Mr. Goudy?

A. No, sir.

Q. What did he say to you in regard to it?

A. I think he said there was an old charter controlled by a lawyer in Chicago by the name of Goudy; perhaps I should not speak of Mr. Goudy in that way, for I have heard of him for many years as a prominent lawyer, but had never seen him—belonging

505 to Mr. Goudy of Chicago; that he thought it was a very valuable franchise, or could be made so, as it was not easy to get into Chicago, and that it could be purchased, and the title was good—the organization was good; that it would be a good thing to get. If I would take charge of it as president and become one of a party of gentlemen which he proposed to get up and furnish the money to build it to do so. I had never met Mr. Walker at that time. I called on Mr. Carey as a friend and an attorney and offered him some stock, which he refused to take and said he would assist me in making the negotiations, and made this contract with him for this party which was proposed to be formed for the construction of the road.

Q. At that time you was a stockholder of the Chicago & Milwaukee road?

A. Yes, sir.

Q. To a considerable extent?

A. A pretty large extent.

Q. One of the directors of the road?

A. Yes, sir.

Q. Where were you living then?

A. I lived in Minnesota.

Q. You had heard in regard to this Chicago & Evanston road previous to Wadsworth mentioning it?

A. No, sir. I don't think I ever heard there was such a company.

Q. Had Carey heard of it when you suggested it to him?

506 A. I don't know. He never had any talk with me. I requested him to come here and he met me here in Chicago. I think I telegraphed him and asked him if he would not meet me in Chicago. I had a long consultation with Mr. Carey.

Q. You knew afterwards that Walker and Goudy had been at different times to Milwaukee and that for some time negotiations had been going on between them and Merrill?

A. I had never heard of it.

Q. You knew it afterwards?

A. I never heard of it until I heard it from Mr. Walker's testimony to-day.

Q. You knew there had been negotiations between those gentlemen?

A. No, sir; I never heard of it until after this suit was commenced.

Q. You knew or heard there had been negotiations in regard to this road?

A. No, sir; I don't think I ever did.

Q. Did Mr. Carey appear to know anything about it when you met him?

A. I don't think he knew anything about it. I didn't ask him whether he did before that time. I don't remember what he did say. I don't think I asked him anything about his previous knowledge.

Q. You knew Mr. Walker knew something about it before that?

A. No, sir; not until I met him.

Q. At that time you knew Walker knew something about this matter?

507 A. I don't recollect whether Mr. Walker explained he had any talk with Goudy. I presume, he says he went on to say, that there was this Chicago & Evanston corporation, and that Mr. Goudy owned it or controlled it, and that he thought we could purchase it, and I think he made an appointment with Mr. Goudy to meet us there. We met Mr. Goudy there and he proposed to sell it to us.

Q. You had some little talk with Walker before you talked with Goudy?

A. I presume we did. I presume he explained the value of such an enterprise. I think it is probable.

Q. And what he knew about the franchise?

A. I don't think he explained to me about the franchise.

Q. He couldn't explain about the value of it without saying what it was?

A. He certainly said what it was. It was an entrance into the city of Chicago. It was an old charter that some Methodist bishop in Evanston had got through many years ago. It had been laying disused, but the organization had been kept up. I don't know whether I learned it from him or Goudy or some one at that time.

Q. Didn't you know if it had connections with the St. Paul road?

A. I think I was told at this time that it connected with it. This ordinance was a joint one with the Chicago & Pacific
508 and Chicago & Evanston and either company could use it.

Q. You knew there was a connection between this track and the Union depot?

A. Yes, sir; with the Chicago & Pacific.

Q. The Chicago & Pacific is under the control of the Milwaukee & St. Paul?

A. Yes, sir.

Q. You knew the connection between the Chicago & Evanston would be with the Milwaukee & St. Paul?

A. Yes, sir; in that way.

Q. That it would be for the interest of the Chicago, Milwaukee & St. Paul to have control of this road?

A. I was aware of that, as I investigated it.

Q. You knew the Chicago & Pacific had been bought and used in connection with the Chicago & St. Paul?

A. Yes, sir.

Q. Owned by the stockholders and officers of the Chicago & St. Paul?

A. Owned in their interest, or rather leased to them.

Q. At that time you understood that the control of the stock and the road was held by Mr. Goudy, did you?

A. On the start I supposed he was the sole owner of the control of it. When he explained the position of the thing he said, I think,
875 shares. Most of the stock was held by the North Chicago City Railway Company or V. C. Turner as security for
509 a note of nearly $40,000 and interest, making something over $40,000, but on the payment of this to Mr. Turner he would transfer the stock to me or to us, and payment was made to Turner, and he transferred, I think, 875 shares, 110 shares remaining with Stickney and some four or five shares with Ela, and the rest of it we got at that time.

Q. Did you see Mr. Turner at that time?

A. I don't think I saw Turner when he came until he tendered his resignation. I think that was the first time I ever saw him, although I paid this money before that time through the Commercial Nat'l Bank.

Q. He was not present when it was paid?

A. I think he deposited his stock with George L. Otis and received his check.

Q. He was not present during the negotiations?

A. No, sir; I think not.

Q. Not when the contract was made?

A. I think not.

Q. When was the arrangement made with Turner about depositing the stock?

A. I don't know. I think it was made by Mr. Goudy. He told me on the deposit of this money Mr. Turner would deposit the stock with Mr. Otis. I think the arrangement was made with Mr. Goudy; I did not make it.

Q. Didn't you have anything to do with it until you made the deposit of the money?

510 A. The contract called for the transfer of the stock to us, and by Mr. Goudy's request, to get the 875 shares, this money was deposited by me in the Commercial Nat'l Bank.

Q. Do you know anything about, or did you have anything to do with, the arrangement with Turner by which it was deposited except to go and pay the money?

A. None whatever, I think.

Q. Was not the time extended at one time, a change made as to whom it should be delivered to?

A. I don't remember; I guess very likely there was, but I don't remember.

Q. You don't remember of any conversation with Mr. Turner about that time?

A. I don't remember of seeing him but once; at that meeting when he resigned as director, it was.

Q. Do you remember about the day when you first met Mr. Goudy?

A. I should think it was about the date of the contract; probably a few days before; long enough to talk up the contract, for Carey to examine the title, the minutes, &c., and report; it might have been three or four days or a week while he was making the examination, but we made the bargain at the first meeting.

Q. At the first meeting?

A. I should think so.

Q. How long was that before the contract?

511 A. I don't remember; it might have been the day before or two days before; it might have been some time after, but I think not. I think Carey required some time to examine the records.

Q. What else did he examine besides the records of the company?

A. I presume he examined the charter or else he knew about it before, or examined the statute.

Q. Do you know whether he examined it or not after you had that first meeting?

A. No, sir; I do not. He reported that it was all right.

Q. What amount of money did you put into this?

A. Individually?

Q. Yes, sir.

A. I put in at various times, I should think, about $\frac{1}{5}$ or $\frac{1}{6}$ of the whole amount; not so much as that. There were 11 shares, and I furnished one share and $\frac{1}{3}$ of another one, the money.

Q. What amount of money did you put in or were you to put in at the time the arrangement was made?

A. I put all the money in then, because we didn't call on the parties in New York for money.

Q. What amount of money did you expect to put into it when you made the contract in the first place; how much were you to put in under the contract personally?

A. I furnished all the money, because the other parties
512 were not convenient to get at.

Q. What amount of money were you personally to put in under that contract?

A. I was to furnish ¼ or more.

Q. One-eleventh of how much?

A. Of an indefinite sum; whatever was necessary to purchase the stock, and then go on and purchase the road.

Q. Two or three days before the signing of the contract you didn't know anything about it; knew nothing about franchise and line of road; did not know what had been done on the road; did not know what had been done to retain the rights under the charter, and you knew nothing about the description or value of the property when you went to Chicago to have the first meeting with Mr. Goudy?

A. I relied on Wadsworth that it was a good thing.

Q. He didn't know anything about the details?

A. I don't know how much he knew of the details. He knew if we could get an entrance into Chicago it would be valuable.

Q. Did you know there was a provision in the charter by which the road or a certain track was to be constructed by a certain time or the charter would be good for nothing?

A. I became acquainted with that, but was informed that the provisions of the charter had been complied with.

Q. Did you know how much track had been laid and whether it was there yet?

513 A. I was told it was laid to the city limits, but that part of it—the north end—was in pretty bad condition, covered up with dirt, and didn't know how much of it was still under the dirt.

Q. Did you go out on the line of road at all?

A. I think not.

Q. Did you send anybody out before you made the contract?

A. I don't think I did.

Q. Did you have surveys made outside of the city limits?

A. No, sir; we had a contract with Mr. Goudy to get the right of way to Evanston.

Q. Do you mean to say you went there and in two or three days you entered into a contract by which you agreed to put in all the money to construct the road without having any knowledge in regard to what had been done under the charter on the road or in regard to what the property was?

A. No, sir; I don't mean to say anything of the kind.

Q. You mean you got your information, such as led you to put your money into this road, from Walker, who had thoroughly examined all these things?

A. I think Mr. Walker recommended it. I think Mr. Walker made a statement of what he thought was its value. I relied very largely on Mr. Wadsworth's recommendation.

Q. Had Wadsworth made an examination of these details?

514 A. I think he knew about the property.

Q. Through Mr. Walker?

A. I don't know. Mr. Wadsworth is an old resident of Chicago, and very intimate with Chicago property.

Q. Was there anybody through whom you made an examination into the franchise and property of this company and what had been done since the charter, except Mr. Walker?

A. I think the minutes showed what had been done.

Q. You say you did not examine them?

A. Mr. Carey examined them.

Q. You relied on Carey's examination of the records?

A. Yes, sir.

Q. You had no other information except what Walker gave you and what Carey found out by looking at the records of the company?

A. I don't remember. I became sufficiently satisfied to put a large amount of money in them.

Q. Mr. Walker's information and the examination of the records by Carey?

A. It was recommended by Mr. Wadsworth, which would be a pretty good recommendation.

Q. At any rate, you relied on these gentlemen. You didn't make any examination yourself?

A. I was not personally acquainted with the thing. I beg your pardon. I did go over the line; drove clear to Evanston with Mr. Goudy at that time.

515 Q. You went over the line to Evanston with Mr. Goudy?

A. Yes, sir; he drove as near as he could on the line where he got the right of way. He had got the right of way substantially to Evanston, and then he had a plan by which he was going into Evanston, and I examined the thing with him.

Q. When was this?

A. At this time.

Q. During the few days?

A. During the time I was making this contract with him—probably before I made the contract. I should presume it was while Carey was off looking at the record and examining the legal part of it as to title.

Q. This was after the first meeting with Mr. Goudy at Walker's office?

A. Yes, sir; probably the next day. It might have been the same day.

Q. You say at the first meeting you made the bargain?

A. I didn't say positively. I said the first time I came to Chicago within a few days.

Q. What else did Mr. Goudy tell you about this matter, about what he had been doing, under what circumstances he got the right of way, &c.?

A. I think he went into the history of the thing pretty well, his getting the charter of Mr. Evans—I don't know whether that is the name or not—and then of the Chicago street railway, at one time having it and using the same franchise to build. I think he

516 told me the original charter came clear across the South Side,

and that the street railway had used everything south of Larrabee street, and he, of course, was anxious to sell his property, and he pointed out the advantages it might have in having it constructed in building up suburban property.

Q. Did he tell you also the advantage it would be to the Milwaukee & St. Paul road?

A. I don't know. I knew what the advantages would be, that it should be in friendly hands, without his telling me.

Q. That was your object in purchasing it?

A. Our object in purchasing it. We thought it was a good investment to make.

Q. You say you knew the value of it in friendly hands to the Mil. & St. Paul. Was not that one of the objects in purchasing it?

A. It might have been.

Q. There is not any other way for accounting for the fact of so many of the officers of that road were men who went into it?

A. Some of the principle ones refused to have anything to do with it; some — have not a dollar's interest and are not stockholders of the company made as large investments as any that did have.

Q. Are not nearly all of these stockholders of the Evanston road large stockholders and directors of the Milwaukee & St. Paul?

A. Some of them are, and some of them who have just as much interest haven't a dollar in the St. Paul road that I know of.

517 Q. Who?

A. Mr. E. L. Frank, who is not interested in the St. Paul road. He is a New York banker and broker. He has about the same interest as any one else, except the two of us who have a little more.

Q. Do you know of any one else who is not interested in the Milwaukee & St. Paul?

A. Mr. Frank may have an interest, but I don't think he has. He is not a director, and I don't know — he is a stockholder.

Q. You don't know of anybody else that is not interested?

A. Most of them are parties interested in the St. Paul Company.

Q. You understood all the information possessed by this party of gentlemen who were buying this road was obtained during two or three days' negotiations at Chicago?

A. Mr. Wadsworth had information about it before.

Q. Who else?

A. I don't know whether any one else had or not.

Q. Mr. Walker, Wadsworth, and Carey?

A. I don't know that Carey knew anything about it. I don't know that Mr. Walker had anything to do with it.

Q. You have said you knew Mr. Walker knew something about this road before?

A. I did not. Of course I presume he explained to me the value of the road when the matter was brought up. He would

518 be prepared to advise as to any part of Chicago. He gave his views of it, I think, if he was asked. I don't know whether he was or not.

Q. You mean you didn't understand Walker knew anything about this thing until you came there?

A. I don't know that he explained anything.

Q. I ask for your understanding about it.

A. Before I went there I think Mr. Walker knew about the Chicago & Evanston, but just what he knew he didn't say anything about it, except if he was asked he expressed a favorable opinion as to its purchase.

Adjourned to 10 a. m. December 3d.

519 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO & EVANSTON R. R. Co. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Friday, the 5th day of December, A. D. 1884.

Present: Mr. Ela, Mr. Walker.

JOHN W. CAREY, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. WALKER, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. John W. Carey, of the city of Milwaukee; attorney and counselor at law; for the last twenty years general solicitor of
520 the Chicago, Milwaukee & St. Paul Railroad Company.

Q. You may look at a copy of the contract I hand you, which is made an exhibit in this case, or what purports to be the copy of a contract between William C. Goudy, of the first part, and Jason C. Easton and John W. Carey, of the second part, bearing date Aug. 8th, 1882, and state whether you are the party whose name appears to that contract.

A. I have looked at the exhibit and say that I executed a contract about that time of that general purport. I should think this was a copy of it. I am the person that executed it.

Q. At the time the contract was executed what personal interest, if any, had you in the matter?

A. I had no personal interest other than this: It was a matter that had been talked over by parties with whom I was acquainted and with whom I had business relations. I was requested to act in making this contract and examining into the matter in their behalf and with an understanding that I might have an interest in it if I would take one.

Q. Did you take any interest in the property purchased?

A. I did not.

Q. At the time of the execution of that contract what knowledge,

if any, had you of any claim by the complainant, James Hill,
521 or *or* by A. B. Stickney & Co., of St. Paul, Minn., to the certificates of stock which were transferred to you and Easton under that contract.

A. I did not know that they or either of them had any claim to the certificates that were transferred under the contract. I don't know that the contract sets forth that 11½ shares purport*ing* to be in that matter of Stickney's which Mr. Goudy said he could get and would get.

Q. When did you first learn that these parties named or either of them made any claim to the certificate for stock purchased under that contract?

A. I cannot tell when I first heard of it, but it was not far from the time—it was about the time that the suit was commenced—that I heard the suit was commenced of Hill against the company; just how long before I could not say.

Q. You may state whether at the time this contract was made you represented in any manner the Chicago, Milwaukee & St. Paul R. R. Co., and state whether that company had any interest in that contract or purchase, to your knowledge.

A. I did not in any manner represent that company in my action in making that contract, and they did not nor ever had, to my knowledge, any interest in it.

Cross-examination by Mr. ELA:

Q. I will ask you, Mr. Carey, who first approached you in regard to acting in this matter.

522 A. I could not state when the first conversation was had about it; but, as I recollect it, in answer to the particular question which you make, I think it was Mr. Wadsworth or Mr. Easton ton that spoke to me about it; one or the other.

Q. As near as you can state, when?

A. It was just about the time or shortly before it was made.

Q. Was that the first time that your attention had been called to that matter of the Evanston R. R. Co.?

A. No, sir.

Q. When was that?

A. My impression is that my attention was first called to it in conversations with S. S. Merrill.

Q. About how long prior to the time that Easton or Wadsworth approached you in regard to the matter, as you have stated?

A. I could not say, but I should think some time before.

Q. Was it about February, 1882?

A. My judgment would be that I first conversed with Merrill earlier than that, but I can't be positive.

Q. How much earlier would you place it, from your recollection?

A. I could not fix any date.

Q. Was it after Mr. Merrill had received a letter from Mr. Hill in relation to it?

A. I never knew that he had received a letter from Hill in
523 regard to it, to my knowledge; no.

Q. Was that conversation with Merrill in regard to the purchase of the road by or in the interest of the Milwaukee & St. Paul Company?

A. The talk with Mr. Merrill resulted from somebody's having heard or spoken to him about the road, about selling it, but who it was or when it was I don't know.

Q. About that time—the time you talked with Easton and Wadsworth in regard to it—what did you do or have to do in relation to the matter?

A. I don't know that I did anything whatever about it.

Q. Did you talk with Merrill more than once?

A. It would be impossible for me to say. For over 20 years I was connected with Mr. Merrill and talking about a great many railroads and purchasing them and consulting about different projects, and I can't say how often I did talk with him about it. I have no recollection.

Q. Did you meet Mr. Goudy during the time this contract was made, in August, 1882?

A. I met him at the time the contract was made.

Q. Did you have some talk with him in regard to the matter?

A. I did at that time.

Q. Were you present during the conversations between him and the other parties and yourself when the negotiations were going on in Chicago at that time?

524 A. I was. Mr. Goudy, Mr. Walker, Mr. Easton, and myself were the parties present.

Q. What other part did you have in the negotiation except to examine as to the property offered and advise and become a party to the contract?

A. I don't recollect that I took any other steps in the matter, except that at one time I had a pamphlet and some papers in relation to it and examined into the title of it, but just when it was I can't say.

Q. Whether it was previous to this negotiation at Chicago resulting in the contract?

A. No, sir; I could not say.

Q. Did you have the record books of the Chicago & Evanston Company at that time, when the negotiation was going on in Chicago?

A. Well, I could not say. I don't recollect that we did. My impression is we took the matter pretty much as Mr. Goudy stated it, except Mr. Walker, I think, had looked into it before.

Q. Did Mr. Walker advise in regard to it?

A. Why, Mr. Walker was present and made some statements to us in regard to it, but just what they were I could not say.

Q. Mr. Easton and Mr. Goudy testify that the record books of the Chicago & Evanston road were given to you to examine at that time. Is that correct?

A. I presume it was if they said so, although I am not
525 positive of that. I did at one time examine these books; made considerable examination of them; recollect very well that I was interested in an injunction suit, an injunction granted by Judge Drummond.

Q. Mr. Goudy says that you took the record books—the book containing the record of the proceedings of the directors and stockholders belonging to the company at this time, in August, 1882—took it home with you over night to examine it there, and Mr. Easton says you reported it was all right the next day. That is the time to which I refer. Is that correct?

A. Well, I am inclined to think I did take the record books and that they were examined at that time; whether by me or Mr. Myers I can't say.

Q. Who is Mr. Myers?

A. He is the secretary. He is one of the employés of the St. Paul Company and somewhat of an expert in records.

Q. You have no other distinct recollection in regard to the examination?

A. No, sir; I have not. I have a distinct recollection about examining that pamphlet and some legal questions connected with it. That is the most distinct thing I remember about it.

Q. Do you remember how long you were here at that time, Mr. Carey?

A. No, sir; I do not.

526 Q. You say that this was a matter that had been talked over with you by parties with whom you were acquainted and associated in business. How many talks had you had previous to coming here with Easton and Wadsworth in regard to this matter?

A. I could not say whether I ever had more than one.

Q. You knew that Mr. Wadsworth had been somewhat acquainted with the condition of this road, did you, at that time?

A. I did not know anything about it, except that I knew that he had had some interests in Chicago. I think I heard him speak of it that he knew there was such a thing, but I do not know anything of the extent of his knowledge or what it was.

Q. You say you was at that time the general solicitor of the Milwaukee & St. Paul road?

A. Yes. I will state now that I think the first I ever heard of it was when Mr. Turner called upon Mr. Merrill at one time when he and I were here and had an interview with him, and Mr. Merrill afterwards told me that it was about this road, about this charter. I think that was the first I ever heard of it.

Q. When was that?

A. Well, I should suppose that it was a year before this took place, but I have no dates that I can tell anything about. It is a mere passing thing. I recollect of their meeting for a talk about it.

Q. You knew in regard to the location of the road and its
527 connection with the Milwaukee & St. Paul and the Chicago & Pacific, did you not?

A. I don't think I knew anything about it prior to that time.

Q. Prior to the time that Mr. Merrill spoke to you?

A. I don't know that I knew anything about it prior to the time I examined it with Easton.

Q. You don't know whether you knew at the time you examined this pamphlet you speak of?

A. Until that time?

Q. You knew about it in the talks you had with Merrill at the time he talked with you in regard to parties wanting to sell it to the Milwaukee & St. Paul?

A. That it had any connection with the Chicago & Pacific road?

Q. And with the Milwaukee & St. Paul.

A. I don't recollect that I did. In fact, I can't state whether it was before or after this time—whether it was before or after we acquired the Chicago & Pacific road.

Q. I ask you because I supposed that the conversation with Merrill was with reference to whether it would be an advantage to the Milwaukee & St. Paul to make the purchase.

A. I understood Mr. Turner to have offered it to Mr. Merrill or talked with him about it as something that would be of advantage to the Milwaukee & St. Paul road.

Q. Well, did you understand, Mr. Carey, that it would be advantageous to the Milwaukee & St. Paul road to have this Chicago & Evanston road either under the control of that road
528 or in hands friendly to it?

Objected to.

Q. What was your understanding about it?

A. I understood that it was offered to Mr. Merrill under the pretence that it would be advantageous to the St. Paul road, but I did not understand myself that it would be at all. It was offered to him with the idea that it might be.

Q. You became acquainted with the fact, did you not, that the Chicago & Evanston road owned one-half of a portion of the road inside the city limits of Chicago jointly with the Chicago & Pacific, of which last-named road the Milwaukee & St. Paul was lessee?

A. I did not so learn and I don't so understand it now. When I examined that pamphlet I did learn that certain ordinances on the North Side were granted to these companies jointly for the occupation of certain streets. I don't think I ever knew it until I did examine that paper.

Q. That the road on those streets had been built jointly by the two companies, was it not?

A. I don't understand so. I didn't understand there was anything of that kind, but it is possible it might be. I did not so understand it.

Q. You understood that the two roads had a joint interest in the right of way on some of the streets?

A. I understood that the rights in the streets were joint
529 over on the North Side to some extent.

Mr. WALKER: You have spoken of S. S. Merrill in your evi-

dence on cross-examination. To whom do you refer, and what is his connection with the Milwaukee & St. Paul road?

A. S. S. Merrill for about 20 years has been the general manager of the Milwaukee & St. Paul road.

Q. What is his present physical condition?

A. He is totally disabled from business, so that I, as a friend, have not been able to see him in three or four months.

Q. During that time would it have been practicable or possible to obtain his deposition in this case?

A. It would not be possible to take his deposition, and has not been possible since last February.

It is stipulated that Mr. Carey may be further cross-examined by Mr. Cole, if he desires, on written interrogatories or otherwise, within two weeks.

530 The time of performance of this contract by the party of the second part is extended to Sept. 5th, 1882, and 875 shares of the stock mentioned therein *has* been deposited with George L. Otis, vice-pres't Commercial National Bank of Chicago, to be delivered to the second party on payment of forty-four thousand dollars on or before Sept. 5th, 1882.

(Sig.) W. C. GOUDY.

(Copy.)

Memorandum of agreement made August 8th, 1882, between William C. Goudy, of the first part, and Jason C. Easton and John W. Cary, of the second part.

1st. The said Goudy is to cause to be transferred to the said Easton and Cary eight hundred and eighty-nine (889) shares of the capital stock of the Chicago and Evanston Railroad Company, and to procure the resignation of the directors of said company and cause the vacancies to be filled by such persons as the said Easton and Carey may designate.

2nd. The said Goudy is to procure and to cause to be transferred one hundred and ten and two-thirds (110⅔) shares of the stock of said company now held by A. B. Stickney to the said Easton and Cary, and in default thereof the measure of damage shall be one thousand dollars, to be deducted from the money hereinafter mentioned to be paid to the said Goudy.

3d. Said Goudy is to render such services in the procurement of the right of way between Fullerton avenue and Calvary cemetery as may be requested by the said Easton and Cary, and shall receive therefor a reasonable compensation for all such services rendered after the date hereof, unless they elect to pay as provided in paragraph eight.

4. Upon the transfer of said eight hundred and eighty-nine (889) shares and also of the said one hundred and ten and two-
531 thirds (110⅔) shares in case the said Goudy shall procure the same and the change of directors the said Easton and Cary are to pay to said Goudy fifty thousand ($50,000) dollars.

5th. The said Easton and Carey, in consideration of the premises, agree with the said Goudy to construct and put in operation the railway of the said Chicago and Evanston Railroad Company from the place where it is now constructed, on Hawthorne avenue, in the city of Chicago, to Rogers Park, on the route on which the same is now located north of Graceland avenue, and to complete the same by the 1st day of March; delays by injunctions or want of right of way to be deducted.

6th. The said transfer of stock and change in the board of directors and payment of money are to be made on or before the first day of September, 1882.

7th. The debts of the Chicago and Evanston Railroad Company to the North Chicago City Railway Company and to the said Goudy are to be paid or released and discharged before or at the time of said transfer and change, and the said Goudy represents there are no other debts or liens except for costs in pending proceedings for condemnation.

8th. The said Goudy further agrees that for the sum of thirty thousand dollars in addition to said fifty thousand dol-
532 lars to complete the right of way for said railroad from the city limits to Calvary cemetery and procure the legal or equitable title thereto in said company free and clear of incumbrance, provided said Easton and Cary shall on or before the 20th day of August, 1882, notify him that they desire him to procure it.

(Sig.) WILLIAM C. GOUDY.
(Sig.) J. C. EASTON.
(Sig.) JOHN W. CARY.

Aug. 9, 1882.—Received on this contract five thousand dollars, $5,000.

(Sig.) W. C. GOUDY.

533 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO AND EVANSTON R. R., Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Wednesday, the 3d day of Dec., A. D. 1884.

Present: Mr. Ela; Mr. Goudy.

VOLUNTINE C. TURNER, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. GOUDY, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

534 It is stipulated that Mr. Chandler and Mr. Turner may be further cross-examined by Mr. Cole, if he desires, on written interrogatories or otherwise, within two weeks.

A. My name is Voluntine C. Turner; residence, Chicago; occupation, manager of the North Side street railway.

Q. What position do you hold in the North Chicago City railway, and how long have you held it?

A. I am president of the company. I have had that position since 1867.

Q. Were you connected with that company in any way prior to 1867; and, if so, how?

A. I was connected with its organization in 1859, as an acting director up to the time I was elected president.

Q. Did that company own or control the Chicago & Evanston Company; and, if so, when was such control obtained?

A. The North Chicago City Railway Co. were the owners and controlled the Evanston Company; they became the owners in 1864—I think 1864 or 1865; I will not be sure which; the fall of 1864, I think.

Q. In what way *way* was the stock held by the North Chicago City R'y Co.?

A. It was held in trust.

Q. By whom.

A. Generally by the board of directors of the North Chicago R'y Co.

535 Q. Did any of the persons who held certificates of other evidences of stock ownership of the North Chicago City R'y Co. have any individual or personal interest in it?

A. They did not.

Q. Was the Evanston Co. indebted to the North Chicago City R'y Co. on or prior to May 28, 1880; and, if so, in what amount and in what form?

A. It was indebted in the nature of a back account amounting to some thirty-odd thousand dollars—thirty-six thousand and some odd dollars.

Q. Was not a sale made by the North Chicago City R'y Co. of its interest in the Evanston Co. to William C. Goudy; if so, when was the contract of sale completed?

A. There was a sale made to Mr. Goudy in the spring of 1880, I think.

Q. Did Mr. Goudy have any authority to sell to Stickney as agent for your company, or was he acting for himself as a purchaser from your company?

Objected to on the ground that the contract is in writing.

A. He was acting as a purchaser, not as agent.

Q. Was there any arrangement or agreement at any time by which Mr. Goudy was to have the possession or control of the interest of your company in the Chicago & Evanston Company before $25,000 was paid by him or for him?

A. No.

Q. Did you participate in the negotiation with Stickney which resulted in the contract of May 28, 1880, mentioned in the bill?

536 A. I did not.

Q. Did you ever meet Stickney; and, if so, when and where, and what conversation did you have with him?

A. I met Stickney on one occasion in your office. I was introduced to him either by you or Mr. Chandler. I had no conversation that I remember; simply passed the time of day; but it didn't exceed two minutes. I didn't take my seat. After I was introduced I passed out of the office.

Q. Did you during any of the negotiations leading up to the contracts of May 28, 1880, represent to Stickney that Goudy either owned or controlled the stock or that he was pledged in any way to the North Chicago City R'y Co. for money advanced in some way towards the construction of the road or for some other reasons?

A. I did not.

Q. Did you at the time these contracts were made or just before go into Goudy's rooms, and were the negotiations drawn up and gone over in the presence of Stickney, and did you then consent to the arrangement finally agreed upon?

A. They were not.

Q. Did you as president of the North Chicago City R'y Co. at that time or during any portion of the negotiations hold out to Stickney that Goudy was the person he was authorized to negotiate and make contracts with relative to the stock in the Evanston Company
537 or with reference to the indebtedness of said company to the North Chicago City R'y Co.?

A. I did not.

Q. Was the interest in the North Chicago City R'y Co. placed in the hands of Mr. Goudy at that time for the purpose of making the deposits he did make by the contract or was it transferred to him as the purchaser?

A. It was transferred to him as a purchaser; a *bona fide* sale.

Q. Did you represent to Stickney or any other person that the North Chicago City R'y Co. had any interest in the property of the Evanston Company except a claim of some thousand dollars, and that the North Chicago City R'y Co. did not own a dollar of the stock or have any claim on the stock in any way, shape, or manner?

A. No; I did not.

Q. Did Mr. Goudy ever ask you prior to the 1st day of June, 1882, to consent to the extension of time fixed for the payment of money to the North Chicago City R'y Co.?

A. No, sir; he did not.

Q. Did you after the 28th day of May, 1880, or before the 1st day of June, 1882, ever consent to any extension of time for such payment or ever make any renewal of your contract with him?

A. I did not.

Q. Did he ever have any authority from the North Chicago City R'y Co. or from you as its president to agree to an extension
538 of time for the payment of money by Stickney under his contract, according to the terms thereof, in the hands of De Koven?

A. No, sir.

Q. Did he ever apply to you or to said company for such an extension?

A. No.

Q. Did you ever hear before the 1st of June, 1882, that such an extension had been made?

A. I did not.

Q. Did you ever hear that Goudy was making an effort to obtain from De Koven the certificate for 875 shares of stock and note for $36,847.78; and, if so, when did you first hear of it?

A. I heard of that about the 1st of June, 1882, soon after my return from Florida.

Q. What action, if any, did you take in reference thereto?

A. I served a notice on Mr. De Koven to deliver the stock and note to me in accordance with the contract, a copy of which I sent to him.

Q. Please attach to your deposition a copy of the notice which you served upon De Koven.

Notice produced and is marked Ex. No. 1 Turner.

Q. I observe at the end of the notice you say that you attach hereto a copy of the contract. Did you attach to this notice a copy of the contract between your company and Goudy?

A. I did.

Q. Please look at the copy of the contract attached to the deposition of Goudy taken in this case, marked Exhibit 14, and
539 state whether or not that is a copy of the contract which you attached to the notice served on De Koven.

A. Yes; that is a copy.

Q. Did De Koven deliver the certificate for 875 shares and the promissory note for $36,847.78 to any one; and, if so, to whom? And state the time of such delivery.

A. Mr. De Koven delivered me the certificate and the note some time between the 8th and 16th of June.

Q. What did you do with the certificate? And state whether or not any other was issued in its place; if so, to whom issued and delivered.

A. I took the certificate to the secretary of the company to cancel on a new certificate in my own name.

Q. What was the date of that certificate?

A. June 16, 1882.

Q. How long did you retain the possession and control of the certificate for 875 shares issued to you on June 16, 1882, and said promissory note?

A. Until I delivered them to Easton.

Q. Can you give about the time of such delivery to Easton?

A. It was in September, some time in September, the same year.

Q. After you had obtained said certificate and note from De Koven did you make any new agreement with Goudy in reference thereto; and, if so, what?

540 A. I made a new arrangement with Mr. Goudy that if he

would give me $25,000 within 90 days, on the first day of October, he could still have the stock.

Q. When was Goudy entitled to the delivery of the certificate representing the shares of stock and the note?

A. When he paid me $25,000.

Q. Did he have the possession or control of said certificate for 875 shares of stock and the promissory note at any time after May 28, 1880?

A. He did not.

Q. Was said certificate for 875 shares and the note deposited by you in escrow; if so, when and where and upon what conditions?

A. I deposited them in the Commercial Nat'l Bank in an envelope. I don't remember the time. The envelope was endorsed on the outside. I don't remember the time; I think in August. The figures on the endorsement will show that.

Q. What were the terms of the escrow and how was it to be delivered?

A. In substance that on the payment to me of $25,000 the certificate and note would be delivered to you or Mr. Walker, and in default thereof they were to be returned to me.

Q. By what time was the $25,000 to be paid?

A. I think the first of October. I don't remember particularly about that.

Q. Look at the envelope I now show you and state whether or not that is the original envelope in which the deposit was made.

A. Yes; that is my signature to it.

541 Q. Please read the writing on the envelope.

A. "This envelope, with its contents, is to be delivered to Edwin Walker or William C. Goudy upon the payment of $25,000 on or before September 5, 1882, and in case of failure in making such payment this envelope and its contents is to be returned to me. Dated August 19, 1882. (Signed) Voluntine C. Turner."

Q. I will call your attention to the following allegation of the bill, that the defendants Goudy, Turner, Chandler, Buckingham, and De Koven conspired and confederated together to defraud said Stickney & Co. and your orator, and induced said Stickney to go into said contract with Goudy, and pay said sum of $20,000 to said Goudy, and ask you what truth there is in that statement.

A. There is not a word of truth in that allegation.

Q. Was there, within your knowledge, any arrangement, express or implied, directly or indirectly, between said persons with reference to the contract between Goudy and Stickney or with reference to the $20,000?

A. There was no arrangement whatever.

Q. Did you or not of such persons receive any part of the $20,000?

A. I did not.

Q. Did the North Chicago City R'y Co. receive said $20,000 or any part thereof?

A. It did not, but wanted some of it.

542 Q. State, if you know, why the $20,000 or some part of it was not paid to the company.

A. I can only state what you told me; that you wanted the money to get the right of way; you thought it would take all that to procure the right of way, and could not afford to let me have any; could not afford to make payments out of the $30,000 on the $25,000 to be paid to the company.

Q. Were you not requested at that time for that reason to take the $25,000 from the deferred payments?

A. I was.

Q. Was Goudy ever entitled at any time to the possession and control of the franchise of the Evanston Co. or its stock or its property without first paying the amount to the North Chicago City R'y Co. which he agreed to pay?

A. He was not.

Q. Did he ever have authority from the North Chicago City R'y Co. or from you to extend the time of the payment of the $25,000 to be paid to it under the contract with Stickney?

A. No, sir.

Q. Did you ever state to any person—and, if so, to whom—after the 1st of January, 1882, that Goudy had no further right to the Evanston franchise or the right to dispose of it?

Objected to.

A. I made that statement to Mr. Julius Wadsworth in Florida; I met him at the hotel; and the statement that he made to
543 me was that the stock had been offered to their company—I supposed that meant the Milwaukee & St. Paul, he being vice-president—for $75,000. I stated to Mr. Wadsworth that no one had any right to sell that stock but the North Chicago City R'y Co. I never heard that it was Mr. Goudy who offered the stock, and I stated Mr. Goudy had no right to sell the stock.

Q. Did he state to you who had made such an error?

A. He did not.

Cross-examination by Mr. ELA:

Q. At what time did the North Chicago City R'y Co. become the owner or controller of stock and the Chicago & Evanston Company, as you say?

A. I think it was in the fall of 1864; might have been early in the winter of 1865.

Q. From whom?

Q. From E. H. Haskins, I think, we purchased of.

Q. Can you state what they paid for it?

Objected to as immaterial.

A. I don't remember what we paid Mr. Haskins at that time.

Q. Do the books of your company show?

A. I think they will. We bought some subsequently of Mr. Hurd.

Q. Will you furnish a statement from the books?

Mr. GOUDY: I object to furnishing a statement from the books in regard to the amount paid for that purpose.

Q. The question is whether you will furnish a statement of the amount paid from the books?

544 A. I would rather not.

Q. Was the stock purchased by your company before the $36,000 was advanced?

A. The $36,000 was a running account; four or five thousand dollars of the account was lawyer's fees for the right of way, and several thousand dollars.

Q. I simply ask the question whether the $36,000 was furnished before or after you became owner of the stock?

A. The cost of the stock and the other accounts going to make up the cost of the Evanston charter to us; part of it was for laying the track on Hawthorne Ave.

Q. The question is whether the $36,000 was advanced by your company after they had purchased this stock?

A. Not all of it.

Q. What portion of it was advanced after you purchased the stock?

Objected to as immaterial.

A. I could not say.

Q. Most of it?

Objected to.

A. No, sir.

Q. Half of it?

A. I could not say whether it was half or not.

Q. Had you or the company been endeavoring to dispose of this stock for some considerable time previous to the spring of 1880?

A. No, sir.

Q. You were offering it at considerably less than it cost you?

545 A. Yes, sir.

Q. And had been willing for some time to take that amount?

A. I think we would.

Q. And for some time afterwards?

A. Yes, sir.

Q. Who requested you to serve the notice you mention on Mr. De Koven?

A. John N. Jewett.

Q. Had you seen Mr. Goudy a short time before that?

A. I had not.

Q. Had any communication from him?

A. No, sir. I was indignant at the application he made to get the stock from De Koven without letting me know, and went and employed another lawyer.

Q. Who notified you that Mr. Goudy had made an application for the stock?

A. John De Koven.

Q. When was this notice to you?

A. I think it was about the 1st of June; it was very soon after I returned from Florida; I think it was about the 1st of June.

Q. When did you make the new agreement with Goudy after that?
A. After I became possessed of the security.
Q. Immediately?
A. Not immediately.
Q. How many days?
A. Might have been a month.
Q. And then you gave him still the opportunity to purchase it at the same price?
546 A. I did.
Q. Was that contract in writing?
A. No, sir.
Q. How long after that was it that you made the arrangement and deposited the stock in the Commercial Nat'l Bank?
A. Probably a month.
Q. Was the time extended much after it was deposited in the Commercial Nat'l Bank within which the $35,000 was to be paid?
A. No, sir.
Q. Was there not an extension from some time in September until the 1st of October made after the first arrangement?
A. My remembrance is I told him after I got possession of it if he could pay me the money by the 1st of Oct., in about three months, he might have the stock still.
Q. Is it not your recollection the time was fixed in September and afterwards it was extended to the 1st of October?
A. I have no remembrance of that; the envelope shows what I did.
Q. Mr. Goudy was your attorney up to the time you took the stock from De Koven back?
A. He has been our attorney for twenty-odd years.
Q. Is he your attorney now?
A. In general consultation, he is.
Q. Did you say it was on your return from the South you served this notice?
A. Yes, sir.
Q. How long had you been South?
547 A. I was South to the 1st of May. I got an inkling from Wadsworth what was going on, and I did not like it. The conversation I had with Wadsworth indicated to me there was something wrong. I wrote to my vice-president from Florida before I returned for that $25,000.
Q. That was in June?
A. This was in March or April. I was in Florida.
Q. I thought you went down in May.
A. No; I returned in May.
Q. You went down when?
A. I went down in February.
Q. You wrote the vice-president before you returned?
A. I wrote to him after my conversation with Wadsworth. When Wadsworth told me this company had been offered the stock for $75,000, I wrote to my vice-president to go and make a demand of Mr. Goudy for the $25,00–, and, in default, to get the stock if it

was a possible thing. On my return De Koven informed me Mr. De Koven had made application for the stock; thereupon I went to Mr. Jewett and took the course he dictated.

Q. Did he state when the application was made by Goudy for the stock?

A. It was very soon after my return in May; probably the last of May.

Q. I mean did De Koven say when Goudy made the application.

A. No; he did not, that I remember.

Q. You mean application to have the stock without paying the $25,000?

548 A. I presume so. I did not see Mr. Goudy.

Q. That was your understanding about it?

A. That was my understanding about it. I did not mean he should have it if I could help it.

Q. That is the reason you took the stock up?

A. Yes, sir.

Q. You did not want it delivered to Goudy or anybody else without your $25,000?

A. That is exactly it.

Q. You was willing at that time and for some time since to deliver it up on the payment of that sum, wasn't you?

A. If Mr. Goudy had defaulted I would not have sold it for that amount of money.

Q. You mean under this contract by which it went to Easton?

A. Yes, sir.

Q. You had no such objection the first time, had you?

A. I had an objection to making a new agreement.

Q. You made one?

A. I made one.

Q. When you were in Goudy's office during the time Stickney was making these negotiations you had a general idea of what the character of the negotiations were, didn't you?

A. Mr. Goudy read me the contract between him and Stickney in order to show me how I was to get my money; that was the only thing I had in my mind.

Q. You understood you was to get your money from Goudy during the arrangement with Stickney?

549 A. I did.

Q. Did you have any conversation with Mr. Easton in regard to this contract for stock?

A. No, sir.

Q. In the procuring of this stock by your company in the first place was Mr. Goudy your attorney?

A. He was our attorney; yes, sir; at that time.

Q. Was he your attorney in that matter?

A. I think he was.

Q. How did he know that he could or that anybody could obtain control of the road previous to this contract with Stickney?

A. Mr. Goudy has been a director in my company ever since he has been — and attorney, too.

Q. And was at the time of these contracts?
A. Yes, sir.
Q. Knew it to be the desire of this company to dispose of this thing and get their money out of it—as much as they could of it?
A. Yes, sir; he knew that, I suppose. We were not over anxious about getting the money out of it.
Q. Did the company have any interest in having the road built?
A. Not the North Chicago City R'y Co.
Q. Did you, personally?
A. No.
Q. You did not make any condition, then, in any of your offers of this stock it should be to somebody who would construct the road?
A. No, sir.
550 Q. When Mr. Wadsworth had this conversation with you in Florida did he say anything to you why he entered into the conversation in regard to this road?
A. I don't remember that he did.
Q. He said it had been offered to the Chicago, Milwaukee & St. Paul?
A. Had been offered to us, he said.
Q. You understood him to refer to what?
A. I understood, he being vice-president of that road, that he meant his company.
Q. He didn't say by whom?
A. No; he didn't say by whom.
Q. About what time was this?
A. It must have been about the last of March or the 1st of April, 1882.

551 CHICAGO, *June 6th*, 1882.

John De Koven, Esqr., trustee &c.

DEAR SIR: You are hereby notified to reassign and deliver to the North Chicago City Railway Company the eight hundred and ninety shares or thereabouts of the capital stock of the Chicago and Evanston Railroad Company, and also a promissory note or obligation of the said Chicago and Evanston Railroad Company for the sum of thirty-six thousand eight hundred and forty-seven ($36,847.78) dollars and seventy-eight cents, without recourse, in accordance with the provision of a contract copy of which is hereto attached.

Y'rs respectfully, V. C. TURNER,
President North Chicago City R'w'y Co.

Exhibit No. 1, Turner's dep.

552 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO & EVANSTON R. R. Co. *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Wednesday, the 3 day of Dec., A. D. 1884.

Present: Mr. Ela, Mr. Goudy, Mr. Walker.

J. C. EASTON, a witness on behalf of the defendant-, being first duly sworn, was cross-examined in chief by Mr. ELA, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.
Ans. ——.

553 J. C. EASTON, being recalled for further cross-examination, testified as follows:

Q. I will ask you to explain your statement in the direct examination that the Chicago, Milwaukee & St. Paul Company did not construct any of the road of the Chicago & Evanston.

A. The Chicago, Milwaukee & St. Paul did not construct any portion of the road except as they were hired—as I would hire anybody else by the day.

Q. What portion of the road was constructed by the Milwaukee & St. Paul for the Chicago & Evanston in that way?

A. I don't think they constructed anything except that portion in Southport avenue before we got our own rolling stock. We got our engine and cars, I think, by the 1st of October, and after that we used our own equipment, except possibly the engine may have been broken down, as we had but one, and we may have had to hire an engine temporarily, and I don't recollect that positively. We purchased from the Milwaukee Co. one of the crossing-frogs; whether that was hauled there on the Milwaukee cars—I presume it would not be transferred to ours. We had a sufficient number of cars for our own purposes. If we purchased any material of them we exchanged with them the same as we would with any other road—that is, took their cars and took them on our track and un-

554 loaded them and then returned them to them to save transfer.

Q. This was after you purchased your rolling stock?

A. Any time. We do it now, the same as any other road does. We purchased very little material from them. We purchased our own ties and made our own contract with the rolling mills.

Q. That was outside of the limits?

A. As to the material inside the limits I would not be sure about. If we purchased rails of them we paid them the same as the rolling mills.

Q. Ties?

A. I am not sure we bought them. I presume the first lot we may have bought of them.

Q. You mean by "them" the Milwaukee & St. Paul Co.?

A. Yes, sir.

Q. State whether when the Chicago, Milwaukee & St. Paul Co. were constructing the road or track for the Chicago & Evanston they were doing it with their men and their engines and their cars and tools and the men paid by the paymaster of their company.

A. I presume they were. We paid the bills as rendered to us.

Q. State whether there was any contract in regard to this construction by the Milwaukee & St. Paul; and, if so, who made it.

A. No contract except in this way: They were requested to work for us and did so, and put in their bill, which we paid.

Q. Who did the business for the Chicago & Evanston?

555 A. I was——

Q. Personally, actually, I mean.

A. I personally approved all vouchers & bills.

Q. Was there any arrangement, then, really entered into beforehand between the two roads?

A. None whatever.

Q. They did it and you paid the bills?

A. The Milwaukee & St. Paul done certain odd jobs for us, and we paid as we paid anybody else that would furnish labor and material.

Q. Please state what portions of the road, the track, of the Chicago & Evanston outside the city limits was constructed by the Milwaukee & St. Paul for the Evanston road.

A. No portion of it was constructed except under our direction, as we would hire any outside help; but that portion in Lake View was paid through the Milwaukee & St. Paul. We arranged with their sup't to furnish foremen and a portion of the tools, but after we got our own equipment, with the exception of a few days when the engine was broken down, we used ours, with the exception of a caboose car, which we have had more or less, and paid their bills as they rendered them.

Q. How much of the road in Lake View is built in this way?

A. About five miles, I think, from the city limits to the north line of Lake View.

Q. How much more road has been constructed except that inside the city limits and to the north line of Lake View?

556 A. It is up to Calvary cemetery and two or three miles further.

Q. State whether, in the construction of the road from the city limits to the north line of Lake View, the Chicago, Milwaukee & St. Paul furnished the men, engine, cars, and tools and paid the men through their paymaster as they did inside the city limits.

A. I don't think they furnished all the men outside at any time. We had our engineer and our own force.

Q. What number of men did you have during that work outside of those furnished by the Mil. & St. Paul?

A. The grading was done through Wells, Harrison & Green, and the fencing was done by a contractor here in town. It was only track-laying; the ties and iron was furnished by ourselves.

Q. Only track-laying was done by the Milwaukee & St. Paul?

A. Only the track-laying. The ballasting and surfacing was done, I think, through our own paymaster.

Q. When did you commence to have a paymaster?

A. From the time we took hold of the concern—that is, not a regular paymaster; but all the vouchers were presented to me and I passed upon them. We never have had a regular office of paymaster. My sup't pays off himself; goes out once a month and makes the payments after I have approved the vouchers and given him the money.

557 Q. State whether there was any contract between the two roads under which the Milwaukee & St. Paul built this track for the Chicago & Evanston outside the city limits.

A. None whatever, either outside or inside the city limits.

Q. State whether the Chicago & Evanston Company had any men in the work of laying track through Lake View and except such as was furnished and paid by the Chicago & St. Paul.

A. The superintendents were our own men, and perhaps others that were paid direct by the Evanston Company.

Q. State, as near as you can, what others.

A. I could not state. The engineers were all furnished by us.

Q. To run the engine?

A. I mean the civil engineers or sup'ts that keep the men when they are grading constantly on the dumps to see everything was properly done; and when the track was being laid we kept more or less engineers to see it was put right.

Q. Did you have any others that you think of?

A. I don't think of any others.

Q. Of whom were those cars purchased you spoke of being purchased by the Chicago & Evanston in October?

A. Wells, French & Co. It is a car company here in Chicago. The French Car Company or Wells, French & Company.

Q. Were some cars bought by the Evanston Co. through the Milwaukee & St. Paul?

A. None whatever; no equipment of any kind purchased of the Milwaukee & St. Paul Company. I don't think even the iron

558 cars or hand cars were purchased through them.

Q. State whether the cars of the Chicago & St. Paul Company were used by the Evanston road in their construction after the Milwaukee & St. Paul constructed that part of the track of the Evanston road up to the north line of Lake View.

Objected to because there is no evidence showing the Milwaukee & St. Paul Co. ever constructed the track.

A. The St. Paul Co. never constructed any road under any contract for the Evanston road. If they worked for us or furnished any men or material we paid for it the same as we paid any other parties who worked for us. We have used a little of the rolling stock of the St. Paul road, and when we have we paid rent for that the same as any other corporation on any portion of the road.

Q. I understand you to say that the Chicago & Milwaukee Co.

constructed the track of the Chicago & Evanston Company inside of the city limits and outside the limits to the north line of Lake View, and rendered you a bill for it—the Evanston Company—and you paid for it.

A. I don't think I testified to anything of that kind. They hadn't anything to do with the principle portion of it. The furnishing of material, grading, engineering, building fences, culverts, bridges, and all that sort of thing they hadn't anything to do with whatever.

559 Q. Please state what they did do.

A. They simply furnished us some men and temporarily, while our engine was disabled, an engine, for which we paid them as we would pay any one that worked for us, and for labor paid the regular wages of the men, the *per diem*, together with 10% added to it to cover the use of tools in track-laying. They had nothing whatever to do with the grading and furnishing the material on any part of the road, unless it may have been in Southport avenue. If they furnished any material there we paid for it the same as we pay for any material bought of Crever, Adams & Co. or any one else.

Q. Have you not testified that the tracks within the points mentioned in my last question was laid by the Milwaukee and St. Paul men with their men, paid through their paymaster, and with their tools, and that they rendered a bill for it and the Evanston Company paid for it?

A. I testified to just what I have said.

Q. I ask that question.

A. That has been my testimony from the beginning.

Q. What has?

A. Just what I have given in a general way.

(Question repeated.)

A. My answer to that is, where they have furnished men and tools we have paid and where they have paid the men through their payrolls we have paid them. A bill was rendered for the *per diem* of the men and 10% added for the use of tools in track-laying.

560 Q. I didn't ask you who you paid or how much. I asked you if the track was laid by them in that way.

A. I tried to explain just how it was done. It was laid in the way I have explained.

Q. Has the Milwaukee & St. Paul road laid any track for the Evanston Company north of the north line of Lake View?

A. Neither north or south except in the way I have explained, where they furnished us men and we paid for it, and I don't know as they furnished us any men north of Lake View. I think not.

Q. In the construction of the track or road north of Lake View has the Chicago & Evanston Company used the cars of the Milwaukee & St. Paul?

A. I don't think we have, unless it be that caboose car we have been renting of them.

Q. Have you had a caboose car belonging to them all the time?

A. I don't know whether we have had it all the time or not; a good deal of the time we hav-n't used it; we hav-n't been laying

track all the time. How it is where they are filling up Hawthorne avenue—that is a sort of joint operation. We have to pay half of the bill and they half.

Q. Has the Chicago & Evanston had that caboose car since they commenced and have they got it now?

A. I don't know what portion of the time we have had it.

Q. Do they have it now?

561 A. I don't know whether they have it now or not.

Q. Who made any arrangement with the Milwaukee & St. Paul for the Evanston Company for the use of passenger cars?

A. I think I did.

Q. With whom, representing the St. Paul Company?

A. Their division sup't here, I think.

Q. Was there any contract?

A. Yes, sir; to pay them rent so much a day.

Q. A written contract?

A. No, sir.

Q. Any number of cars agreed upon or the length of time?

A. I think when we were trying the experiment of running a passenger train that we furnished the engine and the trainmen and they rented to us two coaches and a baggage car, for which they charged us $5 per day for each car.

(Question repeated.)

A. It is possible that we run that car. We would have necessarily have to run over their track in the Union depot, and I presume we hitched our engine onto it when it got onto our tracks, or at the Western-avenue junction. That is where we stored the engine in their round-house. We paid them $31 a month for storing our engine and washing it when they have stored it.

Q. Answer the question. You say there was a contract?

A. There was no specified contract except they furnished

562 the cars at our request, and when we were through the bill came in—I think $10—and we got them to cut it down to $5. We thought it was rather heavy. I am not sure as to which; either $5 or $10.

Q. Any number of cars agreed upon or any length of time?

A. No special agreement beforehand excepting we wanted a train of cars, a small train, we requested so many cars. They furnished them and then rendered their bill, which they claimed was the regular price that all the roads charged when they leased their cars to other roads.

Q. Did the Evanston road pay anything else except a rate per car for the cars used?

A. Yes, sir; we had to pay for the fuel we bought from them, I think, and paid so much a ton for it. We paid for the washing of the engine and then for a watchman to look after it, 50 cents a day, perhaps. We paid the customary charges that one railroad charges another for like accommodations.

Q. For the use of their engine?

A. If we used it we had to.

Q. Do you remember whether you did?

A. I think we used ours after we got it, except when it was out of order.

Q. What did you pay for the use of the depot—the Union depot?

A. I don't remember now whether there was any bill rendered for that; it is my belief about $2.50 a day was the receipt of passengers while running it. I don't remember whether
563 there was any bill presented or not of the Union Depot Company.

Q. Did you pay anything for the use of the Milwaukee & St. Paul track from the depot to the junction of that road?

A. I don't remember whether there was any bill paid for that or not. I should not be inclined to pay it. I think we paid enough for the cars without paying any trackage. I think probably that would cover trackage on their own track, but I don't remember whether there was any bill put in or not. I should demur to it if they did.

Q. Was there any vote or action of the stockholders or directors of the Chicago & Evanston road in relation to this arrangement with the Milwaukee & St. Paul Co.?

A. None whatever.

Q. Where does the construction now being used on the Chicago & Evanston road start from?

A. The engine starts from the Western-avenue round-house. The cars are left on our track, but we have no round-house. We rent a stall of them and they keep it for us.

Q. You mean the Milwaukee & St. Paul Company?

A. Yes, sir.

Q. So far as the Chicago & Evanston Co. uses its track or used it since the construction of it, is it used only for the junction with the Milwaukee & St. Paul track?

A. Only for the junction.

564 Q. And then it there connects with the Milwaukee & St. Paul track?

A. It does. They don't allow us to run our train over their track.

Q. You run some cars over their track?

A. If we do they run them themselves. They deliver everything to us on our track or on a side track at the junction, which is a joint track.

Q. That part of the Chicago & Evanston track which runs south from the junction of the Milwaukee & St. Paul down Larrabee St. has not been used at all?

A. We have had no occasion to use it at all except in the grading we have done and doing jointly lately, and that portion of it was leased before we had anything to do with it. One-half interest was leased to the St. Paul road, and they are still occupying that whole track south of the junction.

Q. When was that lease made?.

A. It was made when Mr. Goudy was president with Mr. Merrill.

Q. A short time previous to your purchasing an interest in this road?

A. I have the lease, but I don't remember.

Q. Does all the material on the Chicago & Evanston line come on to that line from the Milwaukee & St. Paul track at its junction?

A. No, sir; the ballast we got from a sand lot, and got it out of the lake by a dredging machine.

Q. Except that ballast and sand?

565 A. I think ties have been purchased of some firm here on South Water St., on Goose Island. Those are loaded onto our cars and switched down by the Milwaukee & St. Paul, and they are delivered to us out at the junction. The steel we use they switch our cars round to the North Chicago rolling mill or wherever it come from, and when loaded we pay them switching charges to switch them to our track.

Q. All the material except sand comes on to your line off from the tracks of the Milwaukee & St. Paul?

A. Most of it.

Q. All but the sand?

A. I don't know. I won't be certain whether the fencing material may have been hauled directly from the barb-wire factory. Some may have been hauled by teams.

Q. But that that comes by rail in car-loads necessarily comes to the junction to be delivered from the Milwaukee & St. Paul track?

A. Yes, sir.

Q. Your line has no other outlet either for cars or material except over the St. Paul track?

A. Not at present.

Q. Have you carried any freight on the line of your road at all?

A. Yes, sir; very little, as a matter of accommodation, to some manufacturing establishments, and we have hauled from the junction up to the place where they wanted to use it.

Q. On whose cars has that freight been carried?

A. Some foreign cars on some foreign road. I could not tell what road or what cars.

Q. Who ran the train?

566 A. We did from the junction.

Q. Run to the junction by the Milwaukee & St. Paul Company?

A. Yes, sir.

Q. Have you any contract or arrangement or have you had with the Milwaukee & St. Paul Company for compensation for the use of their tracks for drawing these materials and cars over their track onto yours?

A. No special arrangement; they make the customary charge. If a car-load of material should come from Milwaukee the freight would follow and we would have to pay the freight. If they switch from Goose Island a car-load of ties or telegraph poles or any other material they would charge the customary switching charges, so much per car; no special arrangement about it except the customary charges.

Q. Has your road paid any bills to that road for the use of

the track belonging to them when your cars have run over their track?

A. Paid for everything that has been presented up to date in the way I have explained. We have paid for all the cars that have been delivered to us as explained.

Q. The question is, if you have paid anything for the use of the track, running your cars over their track.

A. No, sir; not for the use of track, but for freight on the material.

Q. Have you paid anything for carrying materials used on your road over their track connected with your track?

567 A. Yes, sir; for every car-load they have fetched to us.

Q. Where will these payments appear?

A. In our accounts.

Q. What book?

A. They appear in the book of vouchers, for one. I am not familiar with the book-keeping myself.

Q. Do you know any instance now in which anything of that kind has been paid?

A. I audit a bill nearly every month and I guess every month several of them, perhaps. I think I do.

Q. Mention one.

A. I could not specify any particular item now.

Q. Will you produce the books showing the items of payments to the Milwaukee & St. Paul Company for material brought over the different tracks onto yours?

Mr. WALKER: I will answer that question. I decline to produce any book of that kind except under the order of court. If the court thinks it is necessary on the hearing of this case we will bring them in, and if the court requires it we will furnish copies of every voucher that has been paid by the Chicago & Evanston to the Milwaukee & St. Paul.

Q. Will you have the books of your company, the Chicago & Evanston, showing payments to the Milwaukee & St. Paul and transactions with that company since the purchase by you of the stock mentioned in your answer produced here for examination?

568 A. I will do whatever the court orders me to do.

Q. Answer the question whether you will produce them here for examination.

Mr. WALKER: I decline to produce them for the reasons I have already stated; if they are necessary for the hearing of the case there is no objection to their production and to certified copies of the vouchers paid by the Chicago & Evanston to the Milwaukee and St. Paul.

Q. Have you built other roads in the interest of the Milwaukee & St. Paul Company?

A. No, sir; it may have been for their interest.

Question objected to.

Q. Have you built roads or branch roads which are now owned or controlled by the Milwaukee & St. Paul?

Objected to.

Mr. WALKER: The witness will decline to answer until the master says he must.

Q. Do you decline to answer?
A. Yes, sir.

Redirect examination:

Mr. WALKER: You have said the Chicago & Evanston Company employed its own force of engineers in the construction of the road. Who had charge as chief engineer of that force?

A. We had Thompson on the start—I don't remember when he left—and since that time Mr. E. G. Nourse.

Q. Has not Mr. Nourse had charge of that force during most of the time of the construction of this road?

569 A. Yes, sir; he has had charge of it. I can't tell exactly how far the track was laid when he came there.

Q. Did he have charge of the laying of the track and grading and superstructure so far as it was then constructed?

A. Yes, sir.

Q. Who was he employed by, and by whom has he been paid?

A. By the Chicago & Evanston. His salary has been paid by that company.

Q. Is the Chicago & Evanston road yet completed or is it in process of construction?

A. It is in process of construction.

Q. Has it been completed to its terminal point in the city?

A. No, sir.

Q. When completed, will it or will it *now* have connection with other roads in the city?

A. It will.

Mr. ELA: Where is its terminal point in the city—where is it to be?

A. We propose to get into the Union depot. We have not got right there yet. We are proposing to come there if we can get there.

Q. When you speak of Mr. Nourse having charge of the laying of the track you mean from what time?

A. From the time he was employed by the Evanston Company. I don't recollect when that was. It was some time in the winter of 1883. He had charge of it when they were laying the track after it froze up. I think he must have come about the 1st of Jan-

570 uary; may have been there before. If it is important I could easily ascertain the exact date.

Mr. GOUDY: We offer in evidence a certified copy of a meeting of the 4th of September, 1882, and notice given on that day to A. B. Stickney and the proceedings of the meeting of directors of Sept. 20, 1882, of the Chicago & Evanston road.

Mr. ELA: I ask for the production of the books of the Chicago & Evanston R. R. Co., mentioned in the notice now present, which was served upon the counsel.

Mr. WALKER: Mr. Ela files a notice, and I admit the service of a notice or a copy on me, but on behalf of the Chicago & Evanston Company I decline to produce the books therein called for until so specially directed to do by the master of the court.

571 In the Circuit Court of the United States for the Northern District of Illinois.

HILL, Complainant,
vs.
CHICAGO AND EVANSTON R. R. *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, Wednesday, the 3d day of Dec., A. D. 1884.

Present: Mr. Ela, Mr. Goudy.

GEORGE CHANDLER, a witness on behalf of the defendant, being first duly sworn, was examined in chief by Mr. GOUDY, and deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

Ans. George Chandler; residence, Chicago; occupation, lawyer.

Q. Are you acquainted with A. B. Stickney and W. C. Goudy; and, if so, how long have you known each of them?

A. I have known Mr. Goudy since 1860, I think, and I first met Mr. Stickney in February, 1880—the first part of February.

572 Q. Did you have any official position in the Chicago & Evanston railroad; and, if so, during what period of time?

A. I was a director and the secretary of the company from the 28th of May, 1880, until the 5th of September, 1882.

Q. While you were secretary were any certificates of stock issued or in existence which showed any payment of money thereon?

A. There were not.

Q. What was the form of the certificates and what did they show?

A. I have brought a form which I will offer in answer to that question. I have filled up the blanks in pencil.

(Marked "Exhibit 1 to Chandler's deposition.")

Q. Was any such certificate issued or held by you; and, if so, for how many shares?

A. There was one certificate held by me for one share.

Q. Did you hold it for yourself?

A. I did not.

Q. For whom did you hold it and who was the real party entitled to the shares?

A. I held it as trustee for the North Chicago City R'y Co.

Q. Who was the real owner of the certificate or shares called for by them before the 28th of May, 1880?

A. The North Chicago City R'y Co., as I understand it.

Q. Did you know when William C. Goudy acquired any interest in said shares and the terms on which he obtained them?

573 A. I did.

Q. State the certificates that represented his interest on and after the 28th of May, 1880, and prior to July 1, 1881.

A. The first certificate issued to Goudy was No. 4, for 67 shares; that was dated Sept. 10, 1877, and was surrendered May 28, 1880, and was included in certificate No. 27 to De Koven. The next was No. 18, for 249 shares, dated Oct. 26, 1877, and surrendered and cancelled May 28, 1880, and included in the certificate to De Koven; the next, No. 22, for 282 shares, dated May 25, 1880, surrendered and cancelled and included in No. 25. No. 25 was a certificate issued to Goudy for 568⅓ shares, dated May 28, 1880, which was surrendered and cancelled and included in No. 27, issued to De Koven. Then there was certificate No. 32 for 5⅓ shares, dated May 28, 1880, which he retained and cancelled on Sept. 5, 1882, which was included in certificate 42, issued to Easton on that date for 875 shares.

Q. Can you state from whom the transfer was made to him on the 25th of May, 1880?

A. That included a number of certificates, I think; perhaps one from Turner, Buckingham, and others; it was a gathering-up certificate, getting them together.

Q. For what purpose?

A. For the purpose of carrying out his contract, putting all in one certificate and getting them together.

Q. What was the date and amount of the certificate issued

574 to De Koven?

A. The amount was 875 shares and the date was May 25, 1880.

Q. Was that certificate issued to him as an individual or as trustee?

A. As trustee.

Q. Was the certificate to John De Koven, trustee, for 875 shares cancelled and another issued for the same shares; and, if so, when and to whom?

A. That certificate was cancelled and a new certificate issued to V. C. Turner, I think, on the 16th of June, 1882.

Q. What connection did you have with the negotiations between Stickney which resulted in the contracts of May 28, 1880, mentioned in the bill?

A. I was present at most or, perhaps, all of the negotiations, although the negotiations were made by Mr. Goudy, and I had a good deal to do with carrying out the details of the contracts, drafts, &c.

Q. Did you, in fact, know fully all about the transactions?

A. I did.

Q. Were you present when the contracts were executed; and, if so, who was there?

A. I was. Mr. Stickney was there, Mr. Goudy, and myself. They were executed in our office.

Q. Was V. C. Turner present during any of the negotiations or when the contracts were signed?

A. He was not.

Q. Were these contracts read by Turner or to him; and, if so, who was present?

575 A. They were read to him, I think, in my room of our office, and Mr. Goudy was present and Mr. Turner and myself.

Q. Was Stickney there at that time?

A. He was not.

Q. You remember of Turner signing one of those contracts as director for the Evanston Co.?

A. I remember his signing it at the same time that he examined it.

Q. After the execution of the contracts, when did you next see Stickney, and where?

A. I next saw him at our office, some time in February, 1881; I think about the middle of February.

Q. Was your attention called to any letter from Stickney between May 28, 1880, and February 14, 1881?

A. Yes, sir; there were two letters, I think, in Dec., 1880, from Stickney inquiring how we were getting on with the right of way.

Q. State, if you know, what the business of Stickney was in calling about the 14th of February, 1881.

A. He came in—he was on his way East from St. Paul, going to New York, I think he said. He anticipated there might be a good deal of trouble in laying the track on Southport Ave., and he wanted to get a good man to attend to it. He said he could take care of Minnesota mobs, but did not know anything about Chicago ones. There had been some trouble before when the track was laid, and he wanted to have a good man to take charge of it, and he had heard of a Mr. Stewart, an engineer, who had laid the track
576 of the Western Indiana road, and wanted us to get into communication with him and see if he would not attend to this. I went down to see Mr. Stewart, but did not find him; he was down at the 12th St. freight station. I left word for him to come and see us, and he afterwards came. He said he would undertake the work, and then Stickney came back in a few days, perhaps a week, and we told him about it.

Q. When Stickney came back on his way from New York what was the subject of conversation then?

A. As far as I recollect, it was simply in regard to laying the track, and his satisfaction that we had obtained Mr. Stewart to take charge of it. I don't remember any more than that and the general subject, how we were getting along with the right of way.

Q. Did you hear Goudy make application to Stickney for an extension of time to get the right of way or any talk as to extension, or as to inability to get the right of way within the time required by his contract?

A. I did not.

Q. Did you know then when the time allowed to get such right of way expired?

A. I did. We had discussed that matter some time before that and examined the contracts and found that Goudy had until the 1st of June to get the right of way.

Q. At what time were those contracts examined with reference to that question?

577 A. It was some time, I think, about the 1st of February or in that neighborhood. I know it was before Stickney was here.

Q. When did you first hear about more time than that allowed by the contract; from whom did you hear it, and where?

A. I think I had only two conversations with Stickney which would touch that subject at all. One was on the 13th of April, 1881, and the other was on the 18th of Dec., 1881. On the 13th of April Stickney was here and called at our office. Mr. Goudy was East. Mr. Stickney asked me how we were getting along in obtaining the right of way. I told him, as near as I can recollect, and we had some talk about when he could commence work. I remember his saying something to the effect that two or three weeks one way or the other did not make any particular difference with him. That is the only conversation I had at that time with him. In December he came to the office and told me that he found that the contract had run out, and he wanted something to show to his people who were behind him; wanted Mr. Goudy to write some letter which he could show to his people and satisfy them that everything was all right. I told him I had no authority to act in the matter; that I presumed Mr. Goudy would do it, as he was anxious to get the road built. These are the only two conversations I had with him about any extension of time.

Q. Did you make a request of Stickney on the 13th of April, 1881, to extend the time to Goudy?

578 A. I did not.

Q. Did you report what Stickney said to Goudy; and, if so, when?

Q. I think I did, after Mr. Goudy came home, although I don't remember the details of the conversation, because we were talking the matter of the road over continually.

Q. Did he express a wish for more time after the 1st of June, 1881?

A. He did not. I supposed at that time we could get the right of way without any question by the 1st of June.

Q. Did you know of the telegrams in August, 1881, copies of which have been made exhibits to Stickney's and Goudy's depositions?

A. Yes, sir; I think I knew of all the telegrams that passed.

(Telegrams shown witness.)

A. Yes; I remember those—the telegrams of August 26, 1881, and the one of Aug. 29, 1881.

Q. When Goudy received from Stickney the telegram of Aug. 26, 1881, what did he say?

Objected to.

A. I remember that at that time we supposed Stickney had abandoned the whole thing. I remember Mr. Goudy, when he received that dispatch, saying to me in substance, After all, perhaps, Stickney will go on and build the road, and if he would he didn't know that he had any objection to it, or something to that effect.

Q. When did you next see Stickney in Chicago after April 13th and how long did he remain?

579 A. I saw him in September. He was here, I think, on the 27th of September and remained here three or four days.

Q. During the time that he was in Chicago at that time did you hear any talk of an extension of time having been made before or any talk of an extension to be made then?

A. No, sir; I did not.

Q. When did you next see Stickney in Chicago?

A. After that time I saw him the 18th and 19th of December.

Q. Have you stated all you remember about extension of time, then?

A. I have. Those were the only two times—April 13th and Dec. 18th. Those were the only times when anything was ever said to me about any extension.

Q. Did Stickney say when he would be in Chicago again; and, if so, what?

A. In December he said that he would be here in January; was coming here to spend a month, as I understood him. Then he thought he would take hold of the road and make some sort of arrangement with other parties by which the road could be built and we get all paid for our work, or something to that effect.

Q. Did you see Stickney in Chicago in January, 1882, or hear of his being here?

A. I did not see him. I have an impression that afterwards I heard that he had been through here. I did not see him.

580 Q. Did you hear of his having passed through Chicago more than once when he did not call at the office?

A. I heard, I think, two or three times of his having passed through here when we did not see him. I think, though, the information I got about it came from you; I don't think I ever heard it from any one else. I remember your telling me several times that Stickney had been here.

Q. Did I speak to you at those times whether or not I had seen him?

A. Yes, sir; you told me you had not.

Q. Simply stated to you I had heard?

A. That he had been here.

Q. After December, 1881, when and where did you next see Stickney?

A. After that time I never saw Stickney until last October, when I went to St. Paul to attend his examination as a witness in this case.

Q. Do you know of work being done by Goudy to get the right of way between the city limits and Calvary cemetery between May 28, 1880, and June 1, 1881?

A. Yes, sir.

Q. How much time did he devote to that work?

A. Immediately after making the contract he spent a great deal of time, and then in the summer he went east and was gone some time. After he came back he commenced again, and from that time on it was a continual matter of work trying to obtain rights of way.

Q. Did you do any work about the same time; and, if so,
581 at whose request and how much time did you spend?

A. I spent more than half of my time trying to obtain rights of way at Mr. Goudy's request.

Q. During what period of time?

A. From the time the contracts were made, and I did a great deal of work during that summer while Mr. Goudy was away, which continued until the sale was made to Easton and afterwards.

Q. Do you know of any attempts of Goudy's to get other parties to build the railroad; and, if so, when and with whom did he try to make arrangements?

A. I do. He was engaged at one time in connection with Mr. H. A. Hurlburt in trying to obtain parties at the East—in New York—to take hold of it, and spent with Hurlburt in New York a good while in trying to perfect an arrangement, and one of the parties came out here to look at the road to see whether they would invest, and then I remember his making an effort with Mr. Crawford, of the Western Indiana road, and there were other attempts made.

Q. The Milwaukee and St. Paul?

A. I don't remember of his making any attempt to sell to the Milwaukee & St. Paul, though I will not be sure about that. He talked about trying all round with a good many parties to effect the building of the road.

Q. At what time were these efforts made?

A. During 1881, I think, commencing in the fall and running on from that time.

582 Q. On down to the time the sale was made to Easton?

A. Yes, sir.

Q. State, if you know, when and by whom the certificates of stock were transferred to Easton.

A. On the 5th of September, 1882.

Q. By whom?

A. Turner.

Q. Did you send a notice of a call made September 4, 1882, for the payment of stock to Stickney, Ela and Parker; and, if so, when & how?

A. I did. I sent notices on Sept. 4, 1882.

Q. To whom?

A. To Stickney, by mailing it to St. Paul; and to Ela & Parker, mailing them to Chicago.

Q. Did Stickney at that time reside in St. Paul?

A. He did.

Q. Where did Ela & Parker reside?

A. In Chicago.

Q. You sent them to their proper addresses?

A. Yes, sir.

Q. What notice, if any, was sent to Ela & Parker of the directors' meeting held Sept. 5, 1882?

A. I sent them a notice by mail in the same way, addressed to them individually at their office.

Q. When did you first hear Hill's name mentioned in connection with the Stickney contract and from whom, and what was said by him?

A. I first heard that from Mr. Goudy. He told me that Mr. Stickney had told him that his friends, the people who were back
583 of him, were in Chicago, and he told me that he had learned that Mr. Hill and Mr. Angus, I think it was, were here, and he concluded they were the parties. That is the first time I ever heard Hill's name mentioned.

Objected to as hearsay.

Q. When, how, and from whom did you next hear Hill's name mentioned in connection with it?

A. I don't remember when I next heard it.

Q. Did you ever hear Stickney speak of Hill as connected with this contract?

A. I never did, except when his deposition was taken.

Q. Have you read the statements of Stickney in the deposition given by him in this case about a conversation with Goudy on or about the 22d of February, 1881?

A. Yes, sir.

Q. Did you ever hear such conversation or such a one in substance before he testified?

A. I never heard such a conversation.

Q. What opportunities did you have of knowing of the application by Goudy for an extension of time or an agreement for an extension?

A. I was in the same office and interested in one way—in having this road built—and I heard about all the conversations that were ever had in the office about it. We were constantly discussing the matter, and I think I would have known it if any such thing ever happened.

Q. According to your recollection were you present during
584 the conversations with Stickney and Goudy?

A. I am confident I was present at most of them.

Q. Did you have a conversation yourself with Stickney to any extent—and, if so, how much—when Goudy was not present?

A. Yes, sir; I had conversations with Stickney a good many times when he would come in there. I presume he talked more with me about the matter than he did with you, one way and another.

Q. During any of the conversations with you did he ever mention the subject of an extension, except what he said on the 13th of April and the 18th or 19th of December, 1880, as you have testified?

A. He never did.

Q. When did you first hear that it was claimed by Stickney that there had been an agreement to extend the time for getting the right of way and paying the money?

A. I never heard that until after Mr. Lowry was here. I don't remember the date of that. Mr. Lowry came here and made some proposition to take Stickney's interest and go on and do the work. You told him at that time (as you told me) that Stickney's interest was forfeited, and he telegraphed to Stickney about it and there was some reply from Stickney about that.

Q. Was that reply a letter that was registered?

A. Yes, sir.

Q. That is the first you ever heard of any claim by Stickney of any extension?

A. Yes, sir.

585 Cross-examination by Mr. ELA:

Q. You say in October, 1877, there was a certificate for 249 shares of stock held by Mr. Goudy or issued to him. Do I understand that he held that up to May 25, 1880, when the 282 shares was issued?

A. I think he did. I think he held that until certificate No. 25 was issued, covering 568⅓ shares, which was May 28th; that that was included in that gathering certificate of 568⅓ shares.

Q. October, 1877, a certificate was issued to him for 249 shares and May 25th a certificate issued for 282 shares. Was that besides the 249?

A. That is in addition to that; yes, sir.

Q. May 28th, 568⅓ shares. What did that include?

A. There were 67 shares issued Sept. 10, 1877; 249 shares Oct. 26, 1877.

Q. Was that an additional certificate?

A. Yes, sir; the certificate of 282 shares was issued May 25, 1880.

Q. So that he held on May 25, 1880, previous to the issuing to him of the 282 shares, 249 and 67 shares?

A. Yes, sir.

Q. Then the 282 share were issued to him May 25th?

A. Yes, sir.

Q. From whom was the transfer of 67 shares in September, 1877, to Mr. Goudy?

A. I could not tell that without looking at the books. I can get the information.

586 Q. Do you know who the transfer of 249 shares was from in October, 1877?

A. I do not remember, but I will refresh my recollection, if necessary, and state it.

A certificate for 250 shares was issued to Julian S. Rumsey Sept. 10, 1877; that was surrendered & cancelled Oct. 26, 1877, and a certificate issued in place thereof to Goudy—No. 18—for 249 shares, & a certificate to Rumsey for one share.

DEC. 4TH, 1884.

GEORGE CHANDLER, being recalled for further cross-examination, testified as follows:

Q. I understood you to say that Mr. Goudy held 249 shares and

67 shares of the stock of the Evanston Co. from Oct., 1867, to May 28, 1880.

A. Yes, sir.

Q. And that by May 25, 1880, he obtained and had put in his own name certificates of further stock to the amount of 282 shares?

A. Yes, sir.

Q. Prior to May 28, 1880, he obtained certificates for further shares and had put in his name enough to make up the 875 shares which were deposited with De Koven, reserving 5⅓ shares for himself, 1 share for Chandler, 1 for Ela, 1 for Parker, and 1 for Chase?

A. I think that is correct.

587 Q. State how many of these shares were held by Mr. Turner previous to May 28th.

A. I cannot tell without an examination of the books. I will get that information; up to May 28th held 252 shares; on that date he received certificates for 3 more shares.

Q. How much stock or certificates for how much stock was transferred by Mr. Turner to Mr. Goudy and put in Mr. Goudy's name before May 28, and about what time was it done?

Q. On May 28th certificate for the 252 shares was surrendered and cancelled and 251 shares thereof was included in the new certificate to Mr. Goudy for 568⅓ shares.

—. To whom was this stock first issued?

—. ——.

Q. I suppose you do not claim that you were present at all the interviews between Mr. Stickney and Mr. Goudy in regard to the matters that Mr. Goudy and Stickney have testified about?

A. No. I am not positive about it, but I was generally present at all the interviews in our office. I think Mr. Stickney never came there without my seeing him and talking with him about it, and we generally all three got together and discussed the matter.

Q. Mr. Goudy and you have separate rooms at the office and did at that time?

A. We do and did.

588 Q. Were there any times when Stickney would be in Mr. Goudy's room when you were not present?

A. There might have been.

Q. And when Stickney would be in your room with you and Mr. Goudy not present?

A. Yes, sir; I think so.

Q. And Mr. Goudy had interviews with Stickney outside of his office at which you were not present?

A. I think he had some interviews at the Grand Pacific Hotel when I was not present.

Q. Do you remember the fact was in September, 1882, when the notices were sent to Ela & Parker, as you have mentioned, that Mr. Ela was East during that time?

A. I don't remember; he might have been.

Q. Mr. Goudy from May 28, 1880, and up to August, 1882, was doing a large law business, was he not?

A. Yes, sir.

Q. Such a business as required the whole or pretty much the whole of his time during business hours?

A. It required a good deal of his time.

Q. When you say he was engaged in obtaining this right of way from May 28, 1880, you mean it was during the leisure time from his law business, do you not?

A. No; I do not mean that; I mean that he made that a part of his regular business as much as his law business, and I don't know but more, for he was very anxious to get the road built.

Q. He was carrying along his law business at the same time?

589 A. Certainly.

Q. It would be a very small portion of the day that would be devoted to this?

A. No; he devoted a good deal of time to it; had a great deal of difficulty in getting the rights of way from the different parties; trying to get voluntary gifts of the right of way without paying for them; had a great deal of negotiation going on continually day after day, going to see this man and that man.

Q. During the summer and fall of 1880 he was not engaged in this work at all, was he?

A. Not during the summer when he was away. I have an impression he went to New York to see some parties there owning some land in the northern part of Lake View and spent some time trying to get the right of way from them, but I don't know anything else he did while he was gone. After he came back my recollection is the work continued right along.

Q. Mr. Goudy testifies he devoted his time during the fall of 1880 to the election of the Democratic President, and did not give any attention to his business. Is not that the fact?

A. During the summer and early fall of 1880 he was interested somewhat as a Democratic politician, and I think paid very little attention to this business until some time probably in November or December.

Q. Were you not also engaged in doing a large law business after May 28th and up to the summer of 1882?

590 A. I was engaged in doing a law business. I was doing a fair law business at that time.

Q. What you did in this matter of right of way was in connection with your other business, was it not?

A. Yes, sir.

Redirect examination:

Q. Did Mr. Goudy have enough law business in his office and control to have occupied the whole of his time if he had not been engaged in procuring this right of way?

A. I think he did.

Q. Did you not have law business enough to occupy all your time regardless of the efforts to procure the right of way?

A. I think so.

Q. Then is it not true that all the time that was devoted to pro-

curing the right of way either by Mr. Goudy or yourself displaced law business which might have been done with profit?

A. I should say so.

Q. Can you state about the average value of the law business of Mr. Goudy when fully occupied; or, in other words, the value of his time to do law business?

A. During the year 1880 and afterwards I think the value of his time, or what he would have received from his law business, would average from $100 to $125 a day; now I think it would average $150 a day.

591 Q. What was the average value of your own services in doing the law business that you did and could do?

A. I do not like to state about my own abilities or business, but I think I earned from $25 to $50 a day; some days not as much and some days more.

Q. Can you give an approximate statement of the time that was spent by each of you in procuring the right of way or attempting to procure the right of way?

A. I can by looking at my diary; my present recollection is we were engaged almost every day in some way, or rather about this business.

Q. That is, to some extent each day?

A. Yes, sir.

Q. I will ask you to examine your memoranda to refresh your recollection and state in your deposition hereafter about the aggregate amount of time spent by you and also the aggregate amount of time spent by Mr. Goudy about the right of way.

Objected to.

A. I will do so.

DEC. 5TH—11 o'clock a. m.

GEORGE CHANDLER, being recalled, testified as follows:

Mr. ELA: Please state whether any law business or any business was declined or sent away from the office or not done on account of Mr. Goudy's obtaining this right of way or being engaged in that work.

592 A. I cannot tell; I know of none, but people who desired to employ Mr. Goudy in legal matters generally went to him. I would not know whether he sent business away or not.

Q. State how it was with you as to that.

A. I do not recollect. I declined any business on account of it.

Q. Were you the secretary of the Chicago & Evanston R. R. Co. on the 20th day of May, 1880, and from that time up to September 5, 1882?

A. I was.

Q. State whether the contract between the C. & E. R. R. Co. and W. C. Goudy, attached to the bill in this case, marked Exhibit A, and the contract between A. B. Stickney & Co. and the C. & E. R. R. Co., dated May 20, 1880, a copy of which is attached to said bill, marked Exhibit B, were spread in full upon the records of said C. &

E. R. R. Co. in the record books of said company on or about the said 28th day of May, 1880.

Objected to.

A. They were spread upon the records of the company, but I think not until some time after May 28th—soon after that.

Q. Were they recorded in said record book and did they appear therein during all of the month of August, 1882?

A. They were, and did so appear.

Q. Did there also appear on said book a record of the vote of the directors of said company authorizing the execution of said contracts?

A. Yes.

593 Redirect examination by Mr. GOUDY:

Q. Was the agreement dated May 28th, 1880, between Goudy and Stickney & Co., a copy of which is attached to the bill as Exhibit C, recorded on the records of the C. & E. R. R. Co.?

A. It was not.

Q. Was any reference made thereto by resolution or otherwise in said record?

A. There was not.

It is hereby stipulated that the witnesses, Walker, Easton, Turner, Carey, and Chandler, may be further cross-examined by Mr. Cole, if he desires, on written interrogatories or otherwise, within two weeks.

594 EXHIBIT No. 1, CHANDLER'S DEP.

Chicago & Evanston Railroad Company.

No. —. Shares, one hundred dollars. Shares, —.

(Name.) CHICAGO, (date), 18—.

This certifies that (name) is entitled to (number of shares) shares of the capital stock in the Chicago and Evanston Railroad Company, on which there has been paid the sum of (No.) dollars on each share. Said shares are transferable on the books of said company by (name) or his attorney on the surrender of this certificate, provided all instalments due thereon shall have been paid.

(Number shares.)

(Date), 18—.

(Name), *President.*

—— ——, *Secretary.*

Know all men by these presents that —, —— ——, for value received, ha- bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer, unto —— —— — shares of the capital stock of the Chicago and Evanston Railroad Company standing in — name on the books of said company and transferable only at its office in Chicago, Illinois, and do hereby constitute and appoint —— —— — true and lawful attorney irrevo-

Certificate No. —.

cably for — and in — name and stead, but for — use to sell, assign, transfer, and set over all or any part of said shares, and for that purpose to make and execute all necessary acts of assignment and transfer and one or more persons to substitute, with like full power, hereby ratifying and confirming all that — said attor-
595 ney or — substitutes shall lawfully do by virtue hereof.

In witness whereof — ha- hereunto set — hand and seal the — day of ——, one thousand eight hundred and —.

—— ——. [L. S.]

Sealed and delivered in presence of—

—— ——.

596 A meeting of the board of directors of the Chicago and Evanston Railroad Company was held on the fourth day of September, 1882, at the hour of eleven o'clock in the forenoon, at room 42, in the building number 162 Washington street, in the city of Chicago, pursuant to a call by the president, due notice having first been given.

The following directors were present: William C. Goudy, Voluntine C. Turner, Samuel B. Chase, and George Chandler.

On motion of S. B. Chase, the following preamble and orders were adopted by a unanimous vote:

Whereas this company is indebted for money borrowed by it and judgments have been rendered for rights of way which are not paid, and it is liable and will become liable for the payment of other sums for right of way, and funds are necessary for the construction of the road: Therefore

It is ordered that a call be made for the payment of the capital stock in full, to be paid at the office of the company, in Chicago, on the 15th day of September, 1882.

It is further ordered that notice of such call be given, as provided in the by-laws, to each person holding or claiming to hold stock or certificates entitling him to stock.

597 It is further ordered that the treasurer be authorized to receive and collect the said assessment.

It is further ordered that the secretary be appointed as treasurer *pro tem.*

STATE OF ILLINOIS, } *ss:*
Cook County, }

I, T. W. Wadsworth, do hereby certify that I am secretary of said Chicago and Evanston Railroad Company and keeper of the records and seal thereof, and that the annexed and foregoing is a true and correct copy of the proceedings of a meeting of the board of directors of the Chicago and Evanston Railroad Company held on the fourth day of September, 1882, as appears by the records of said company.

In witness whereof I have hereunto set my hand and affixed the seal of said company this twenty-eighth day of November, A. D. 1884.

[SEAL.] T. W. WADSWORTH, *Sec'y.*

598 In the United States Circuit Court for the Northern District of Illinois.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

To the Chicago and Evanston Railroad Company or Edwin Walker, their solicitor:

You are hereby notified to produce at the taking of testimony on the part of defendants to above-entitled cause on the 2nd day of December, 1884, at ten o'clock a. m., at the office of Henry W. Bishop, Esq., master in chancery, and before said master the books and records of said company containing the record of the proceedings of the directors and of the stockholders of said company during September, 1882, and since that date.

GORDON E. COLE,
ELA & PARKER,
Sol'rs for Comp't.

599 STATE OF ILLINOIS, } ss:
Cook County, }

THOMAS PARKER, Jr., being first duly sworn, on oath says that he served the within notice on the 29th day of November, 1884, on the Chicago and Evanston Railroad Company and their solicitor by leaving a true copy thereof with Leslie Carter, at the office of Walker & Carter, attorneys, in the city of Chicago, in said county.

THOS. PARKER, JR.

Subscribed and sworn to this 2nd day of December, 1884.

F. R. GROVER,
[SEAL.] *Notary Public.*

600 CHICAGO, ILLINOIS, *Sept. 4th*, 1882.

A. B. Stickney, Esq.

DEAR SIR: You are hereby notified that at a meeting of the board of directors of the Chicago & Evanston Railroad Company held this day the following preamble and orders were adopted by said board: Whereas this company is indebted for money borrowed by it, and judgments have been rendered for right of way which are not paid, and it is liable and will become liable for the payment of other sums for right of way, and funds are necessary for the construction of the road, therefor- it is ordered that a call be made for the payment of the capital stock in full, to be paid at the office of the company, in Chicago, the 15th day of September, 1882.

It is further ordered that notice of such call be given, as provided in the by-laws, to each person holding or claiming to hold stock or certificates entitling him to stock.

It is further ordered that the treasurer be authorized to receive and collect the said assessment.

It is further ordered that the secretary be appointed as treasurer *pro tem.*

Respectfully yours,

GEORGE CHANDLER, *Secretary.*

601 STATE OF ILLINOIS, }
County of Cook. }

EDWIN STEWART, being duly sworn, says that he duly mailed the above notice, of which the foregoing is a true copy, on the fourth day of September, A. D. 1882, in an envelope addressed A. B. Stickney, St. Paul, Minnesota.

EDWIN STEWART.

Subscribed and sworn to before me this 5th day of September, A. D. 1882.

EDGAR A. FELLOWS,
Notary Public.

STATE OF ILLINOIS, }
Cook County, } *ss:*

I, T. W. Wadsworth, do hereby certify that I am secretary of said Chicago and Evanston Railroad Company and keeper of the records and seal thereof, and that the annexed and foregoing is a true and correct copy of a notice sent A. B. Stickney, St. Paul, Minnesota, on the fourth day of September, A. D. 1882, and an affidavit of Edwin Stewart attesting the forwarding of the same, as appears by the records of said company.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said company this twenty-eighth day of November, A. D. 1884.

T. W. WADSWORTH, *Sec'y.*

602 Pursuant to adjournment and to notice given to each director in accordance with the by-laws the board of directors met at room No. 8, Ashland block, Chicago, at 11 o'clock a. m. of Wednesday, September 20th, 1882.

Present: The president and Messrs. Hubbard, Wadsworth, and Walker—4.

Absent: Messrs. Ela, Merrill, & Parker—3.

The president having taken the chair, on motion, duly seconded, the reading of the minutes of the last meeting was dispensed with.

Mr. Walker presented the draft of a code of by-laws for the government of the company, and, on motion of Mr. Hubbard, seconded by Mr. Wadsworth, further consideration of the same was postponed until the next meeting.

On motion of Mr. Wadsworth, seconded by Mr. Hubbard, the following preamble and resolution was unanimously adopted:

Whereas Mr. J. C. Easton has paid into the treasurer of this company the sum of eighty-seven thousand and five hundred dollars ($87,500), being the amount due from him on eight hundred & seventy-five shares of stock standing in his name:

Therefor- be it resolved, That the president and treasurer be, and are hereby, directed to issue to J. C. Easton, trustee, a certificate for eight hundred and seventy-five shares of the full-paid stock of the company.

603 Mr. Walker then offered the following resolution, which was seconded by Mr. Hubbard, and, after due consideration, was unanimously adopted:

Whereas an assessment and call was made on the 4th day of September, 1882, for the payment of the capital stock in full on the 15th day of September, 1882; and

Whereas notice of such assessment and call has been given and more than ten days has elapsed since such notice was given, in pursuance of the by-laws and the subscription of stock; and

Whereas A. B. Stickney, John W. Ela, and Thomas Parker, Jr., have each failed to pay such assessments or any part thereof:

Resolved, That in accordance with the terms of the subscription of stock and section 2, article 4, of the by-laws that all certificates for the capital stock of the company owned or claimed by the said A. B. Stickney, John W. Ela, and Thomas Parker, Jr., and each of them be forfeited and the president and secretary be authorized to sell the stock represented by such certificates at the par value thereof to any other person and issue certificates on full payment therefor.

604 STATE OF ILLINOIS, } ss:
Cook County, }

I, T. W. Wadsworth, do hereby certify that I am secretary of said Chicago and Evanston Railroad Company and keeper of the records and seal thereof, and that the annexed and foregoing is a true and correct copy of proceedings of a meeting of the board of directors of the Chicago and Evanston Railroad Company held on the twentieth day of September, 1882, as appears by the records of said company.

In witness whereof I have hereunto set my hand and [SEAL.] affixed the seal of said company this twenty-eighth day of November, A. D. 1884.

T. W. WADSWORTH, *Sec'y.*

Endorsed: Filed Feb'y 25, 1885. Wm. H. Bradley, clerk.

605 *Agreement Between W. C. Goudy and A. B. Stickney & Co.*

This article of agreement, made and entered into this twenty-eighth day of May, A. D. 1880, by and between William C. Goudy, of the city of Chicago and State of Illinois, party of the first part, and A. B. Stickney & Co., of St. Paul, in the State of Minnesota, parties of the second part, witnesseth:

That for and in consideration of the covenants and agreements of the said parties of the second part hereinafter contained the party of the first part agrees—

First. That he will perform all and singular the covenants and agreements on his part contained in a certain contract bearing even

date herewith, by and between the Chicago and Evanston Railroad Company, party of the first part, and William C. Goudy, party of the second part, a copy of which is hereto attached, marked Exhibit A, and made a part of this contract.

Second. That he will at the time of the execution of this contract cause to be properly assigned to John De Koven, as a trustee, eight hundred and seventy-five shares of the capital stock of the
606 Chicago and Evanston Railroad Company, to be held by him in trust for the purposes hereinafter specified; that he will also at the same time cause to be properly assigned to said John De Koven, as trustee, a certain note, bearing even date herewith, made by the Chicago and Evanston Railroad Company to the North Chicago City Railway Company for the sum of thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars, payable in one year from date, with eight per cent. interest, to be held by him in trust for the purposes hereinafter specified, and also that he will at the same time cause to be properly assigned to said John De Koven, as trustee, all his claim and right to the sum of twenty-five thousand dollars which shall become due to him, the said William C. Goudy, from the Chicago and Evanston Railroad Company on completion of the contract before mentioned, which is hereto attached and marked Exhibit A, to be held by him in trust for the purposes hereinafter specified.

Third. That he will, and does hereby, guarantee to keep and save harmless the Chicago and Evanston Railroad Company and said parties of the second part of and from all debts of said company now existing and which may be contracted by said company before the control of the corporation is transferred to the party of the second part, as hereinafter provided, except the note of thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars, hereinbefore mentioned, to the North Chicago City Railway Company and the indebtedness growing out of the contract hereto attached, marked Exhibit A, and except also any other indebtedness created by the agency and authority of the parties of the second part and their assigns.

He further agrees that if any suits shall be commenced before the track shall be relaid and put in repair on Hawthorne or Southport avenues north of the junction with the Chicago and Pacific
607 railroad, or within three months thereafter, involving the title to the right of way of said company in said Hawthorne or Southport avenues north of said Chicago and Pacific railroad, in the city of Chicago, or the right to lay and maintain the track of said company in said city between the junction of the Chicago and Pacific railroad and the city limits, or the right to operate the same with steam power, he will take charge of said suits and render his professional services therein to said party of the second part or the Chicago and Evanston Railroad Company without any other compensation than that provided in the agreement between the said William C. Goudy and the Chicago and Evanston Railroad Company.

In consideration of the premises the said parties of the second part hereby agree to and with the party of the first part as follows:

First. To pay him the sum of fifty-five thousand dollars in installments, namely, on the signing of this contract the sum of twenty thousand dollars; in ten days after the first party shall have performed and completed all the agreements on his part contained in the contract Exhibit A, except the agreements in relation to professional services contained in the fourth article thereof, and given notice in writing thereof to said party of the second part (he shall also at the same time of giving said notice furnish to such person in Chicago as said second party shall appoint proper evidence of such completion. If the second party is not satisfied with such evidence its sufficiency shall be determined by disinterested persons to be chosen as hereinafter provided), the further sum of fifteen thousand dollars; in sixty days after the last payment shall have become due, the further sum of twenty thousand dollars. It is expressly understood, however, that an appeal from any judgment in a condemnation proceeding shall not be ground for postponement of the payments aforesaid if bond shall be given by the said company and the party of the first part shall become security or
608 shall procure security on the appeal bond, as required by section thirteen of the statute of eminent domain, so that possession can be taken of said property, and good security furnished by the party of the first part, so as to save the second parties and said Chicago and Evanston Railroad Company harmless from all liability for damages assessed or which may be assessed for the land involved in said suit; but the parties of the second part may pay the amount of any such judgment to the county treasurer, according to the statute, and such payment shall be considered as a payment to the party of the first part under this contract; and if the parties are unable to agree as to the time when any of such payments are to be made, according to the terms of this contract, that shall be determined by two disinterested persons, one of whom shall be chosen by each party, and in case of disagreement between the two persons they shall select a third disinterested person, and the decision of any two of them shall be conclusive between the parties.

Second. That they will perform all the agreements on their part contained in a certain contract, bearing even date herewith, made by and between the Chicago and Evanston Railroad Company and the parties of the second part in relation to the construction of a railroad for the Chicago and Evanston Railroad Company, a copy of which is hereto attached, marked Exhibit B, and made a part of this contract.

Third. That when said road is completed and the control of the Chicago and Evanston Railroad Company shall be transferred, as herein provided, the second parties shall cause it to be equipped with proper rolling stock and put in operation from its southern terminus to Calvary cemetery.

It is further mutually agreed by and between the parties hereto that the said eight hundred and seventy-five shares of stock and the

said note made by the Chicago and Evanston Railroad Com-
609 pany for thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars and the said sum of twenty-five thousand dollars which shall become due to said party of the first part under the contract marked Exhibit A, hereto attached, which are by the terms of this contract to be transferred to John De Koven, trustee, shall be held by him in trust until either the party of the first part or of the second part shall be entitled to the delivery and possession of the same according to the terms of this agreement. The said second party shall make the deferred payments aforesaid, to wit, fifteen thousand dollars and twenty thousand dollars, to the said John De Koven in trust for the party of the first part, to be paid to him or as he may direct.

If the second parties shall fail or neglect to make either of said payments as hereinbefore provided the said first party may declare this contract ended, and all money paid and all rights under this contract shall be forfeited and may be kept by the first party as liquidated damages, and the said John De Koven shall assign and transfer the shares of stock held by him to the party of the first part, together with any money in his hands, and thereafter all rights and interests of the second parties in said stock or said note for thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars, or the moneys to become due the said first party under the said contract marked Exhibit A, attached hereto, or in said company or its franchises or property, shall cease and be at an end. If the second parties shall make said payments at the time and in the manner specified and shall fully perform all the covenants and agreements herein contained, then the said John De Koven, trustee, shall assign and transfer to the second parties said shares of stock and the said note for thirty-six thousand eight hundred and forty-seven $\frac{78}{100}$ dollars, and the moneys to become due to said first party under the contract
610 marked Exhibit A, hereto attached, held by him, and the full control of the board of directors and the officers of said company shall be given to the parties of the second part until the full performance by the second parties of all the covenants contained herein on their part. The first party and such other persons as he may designate shall have the right to vote the stock held by John De Koven, trustee, and to have five of the seven directors while the board consists of seven, and if it is composed of five, then four of the five directors, the same as if said shares had not been assigned to said trustee. It is the intention of the parties hereto to allow the party of the first part the full possession and control of the franchises and property of the Chicago and Evanston Railroad Company as security for the performance of this agreement by the second parties.

It is further understood and agreed that the first party shall have the right to locate four depots on the line of the said road, but this shall not be construed to obligate said second parties or the Chicago and Evanston Railroad Company to erect any depot building at such points.

It is further understood and agreed that if default be made by the party of the first part in the performance of any of his agreements herein contained, so that the deferred payments of fifteen thousand dollars and twenty thousand dollars shall not become due and payable under this contract, and such default shall continue for three months after the first day of March, 1881, then upon payment by said parties of the second part of the sum of twenty-five thousand dollars to said John De Koven, trustee, for the use of said party of the first part, in lieu of said deferred payments of fifteen thousand dollars and twenty thousand dollars, it shall be the duty of said John De Koven to assign said stock and deliver said promis-
611 sory note and the assignment of the claim of said party of the first part against the Chicago and Evanston Railroad Company in his hands to said party of the second part, and said party of the second part shall be entitled to recover from the first party such damages as they may sustain by reason of such default, not exceeding thirty-five thousand dollars; but in case said second party shall neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said De Koven shall transfer said stock and deliver said note and assignment in his hands to the first party or his assigns.

In case of the death, refusal, or inability to act of the said John De Koven, trustee, named herein, then the president for the time being of the Merchants' National Bank of Chicago is hereby appointed successor in trust of said John De Koven, and as such successor he shall have the same powers and perform the same duties provided for said trustee herein; but if such president of said bank shall decline to act as such trustee, then a successor in trust shall be selected by such parties; and if they fail to agree upon a successor, then such successor may be appointed by any court of competent jurisdiction.

This agreement shall be binding upon the heirs, executors, administrators, and assigns of the respective parties.

This agreement is executed by A. B. Stickney, for himself and others who have authorized him to execute the same and furnished evidence of the authority to the cashier of the First National Bank of St. Paul, for the benefit of the first party.

WILLIAM C. GOUDY.
A. B. STICKNEY & CO.

612 EXHIBIT A.

These articles of agreement, made and entered into this twenty-eighth day of May, A. D. 1880, by and between the Chicago and Evanston Railroad Company, a corporation existing under the laws of the State of Illinois, of the first part, and William C. Goudy, of Chicago, Illinois, of the second part, witnesseth:

That whereas the said party of the first part is desirous of obtaining the right of way for the construction of its line of railroad from the northern limits of the city of Chicago to Calvary cemetery, in the

town of Evanston, and establishing its complete right of way in the city of Chicago:

Now, therefore, the said party of the second part hereby agrees, in consideration of the agreements of the said party of the first part on its part to be kept and performed—

First. That he will procure an adjustment of accounts between the party of the first part and the Chicago and Pacific Railroad Company growing out of a contract between said companies, dated on the second day of June, 1874, in regard to the construction of tracks on Hawthorne, Jones, and South Port avenues, in the city of Chicago, and the use of the track owned jointly by them, and will procure the right of the party of the first part to use and occupy that portion of the Chicago and Pacific railroad between Willow street and the point of junction of the Chicago and Evanston railroad, according to the provisions of the ordinance of the city council of the city of Chicago passed June 12, 1872, and if any sum in such adjustment and procuring said right is due by the party
613 of the first part to the Chicago and Pacific Railroad Company it shall be paid by said party of the second part or the party of the first part discharged from all liability therefor.

Second. That the right and authority, if any is yet required, to connect the track of the Chicago and Evanston Railroad Company with the track of the Chicago and Pacific railroad at the place on Hawthorne avenue fixed in the ordinance of the common council of Chicago passed June 12, 1872, shall be obtained by him for the party of the first part without expense to said party of the first part.

Third. That he will procure or cause to be procured for and vested in the said party of the first part the right of way for the operation of the railroad of said party of the first part from the northern limits of the city of Chicago, where the track of said company to be constructed in said city under a contract this day made with A. B. Stickney & Co. shall end, to Calvary cemetery upon such feasible and practical line as said party of the second part may select for building said road, using no greater curve than an eight-degree curve (unless by consent in writing of said A. B. Stickney & Co.). When it shall be necessary so use a street or part of a street he will procure or cause to be procured lawful permission therefor from the proper municipal officers. When the line runs over private property the width of such right of way shall be fifty feet for the distance of one mile and one-half north of the city limits and of the width of sixty feet for the remaining distance. All damages, costs, and considerations necessary to be paid in the procurement of said right of way or for the same shall be paid by said party of the second part.

He also agrees to perform or at his own expense procure the performance of all legal services necessary to be performed in the procurement of said right of way by condemnation or otherwise.

614 The said right of way over private property *is* to be procured shall be free from incumbrance and condition other than that the track shall be laid within a specified time and the lo-

cation of any four depots *to* be fixed by the party of the second part as herein provided.

Fourth. He further agrees that if any suits shall be commenced before the track shall be relaid and put in repair on Hawthorne and South Port avenues north of the junction with the Chicago and Pacific railroad or within three months thereafter involving the title to the right of way of said company in said Hawthorne or South Port avenues north of said Chicago and Pacific railroad, in the city of Chicago, or the right to lay and maintain the track of said company in said city between the junction with the Chicago and Pacific railroad and the city limits or the right to operate the same with steam power, he will take charge of said suits and render his professional services therein to said party of the first part without any other compensation than that hereinafter provided.

In consideration of the foregoing agreements of said party of the second part said party of the first part hereby agrees to pay to the said party of the second part the sum of twenty-five thousand dollars upon the complete performance by him of the agreements upon his part to be kept and performed.

Said party of the first part further agrees to and with the said party of the second part that as a part of the consideration for the agreements herein contained on his part all donations of money, property, land, or obligations given or promised by parties owning or interested in lands between Chicago and Calvary cemetery as local aid shall belong absolutely to the said party of the second part free from any claims of the party of the first part; and in
615 case any conveyances should be made to said first party of lands or property by parties so owning or interested in such lands as local aid other than conveyances of the right of way, the same shall be held by said first party in trust for said party of the second part and shall be conveyed by it as he shall direct; and it is further agreed that the party of the second part may fix the location of four depots.

Said party of the first part further agrees that said party of the second part may, at his own cost and expense, procure new right of way within the city of Chicago and the right from the city of Chicago to operate said railroad thereon by steam power, and change the line of said road between a point on South Port avenue seven hundred feet south of the city limits and said city limits at the pleasure of said party of the second part; but if any such change is made the new right of way shall be secured from the city of Chicago and the property-owners before the first day of October, 1880, but the right of way now existing under the ordinance of the city shall not be extinguished until the new ordinance shall be submitted to and approved in writing by A. B. Stickney & Co. and accepted by the party of the first part.

The said party of the second part shall perform the first, second, and third paragraphs of this agreement by the first day of March, 1881; but it is understood that if judgments for damages in proceedings for condemnation of the right of way on petition of the party of the first part shall have been obtained before that time the

pendency of any appeal from any such judgment at that time shall not be a breach of the agreement, provided the party of the second part shall become security or shall procure security on the appeal bond as required by section thirteen of the statute on eminent domain, so that possession can be taken of the property against
616 which the judgment is rendered and good security be given to save the party of the first part from liability for damages assessed or which may be assessed for the land involved in said suit.

It is further understood and agreed by the parties hereto that if the said party of the second part fails to perform any of the stipulations and covenants herein on his part to be performed, he shall not be liable for damages beyond the loss of the right to the compensation and price or the just share thereof agreed to be paid by the party of the first part.

In witness whereof the said Chicago and Evanston Railroad Company, by Volentine C. Turner, a director, and its secretary, who have been authorized by resolution of the board of directors and attested by its corporate seal, has executed this contract and the party of the second part has signed his name the day and year first above written.

THE CHICAGO AND EVANSTON R'Y CO.,
By V. C. TURNER, *Director.*

GEORGE CHANDLER, *Secretary.*

WILLIAM C. GOUDY.

617 EXHIBIT B.

This article of agreement, made this 28th day of May, A. D. 1880, by and between A. B. Stickney & Co., of St. Paul, in the State of Minnesota, party of the first part, and the Chicago and Evanston Railroad Company, a corporation of the State of Illinois, party of the second part, witnesseth:

That the party of the first part, for and in consideration of the payments and agreements hereinafter contained to be paid and performed by the second party, hereby agrees to and with the second party:

First. That they will furnish all material, except such iron and other material as the second party now owns, construct and complete in a good and substantial manner so that cars may be used thereon, using new ties eight feet long, not less than six-inch face and six inches thick, twenty-six hundred and forty to the mile, not less than forty-five-pound T rail, with proper fastenings, a single-track railroad for the second party on right of way now owned by the second party on Hawthorne and South Port avenues or which shall hereafter be first obtained by it (according to a contract, bearing date herewith, entered into between the second party and one William C. Goudy), at its own cost and expense, from its junction with the Chicago and Pacific railroad to the south line of Calvary cemetery, in the town of Evanston, together with suitable side tracks and turnouts for the proper operation thereof, within

four months after the first day of March, 1881: Provided, that if they are delayed by restraining orders or writs — any kind or an overpowering force the time of such delay shall not be reck-
618 oned as a part of such four months: And provided further, that if the said first party shall enter upon and prosecute in good faith the construction of said road at a proper time and are unable from any cause to complete the same within the said four months such delay shall not work a forfeiture of this contract, but shall be compensated in damages at the rate of twenty dollars per day for each and every day's delay over said four months, but damages shall not be assessed or paid for any delay occasioned by the party of the second part or by restraining orders or writs or by an overpowering force; but if such delay of the first party shall continue for six months after the expiration of the four months aforesaid, and said road shall not then be completed, the second party may declare this contract at an end, and all work done and material furnished shall be kept and retained by the party of the second part as liquidated damages, but delay occasioned by restraining orders or the fault of the second party or such overpowering force shall not be reckoned as a part of said six months.

Second. That they will keep an accurate account of the costs and expenses of the work done and material furnished under this contract, and at the completion thereof make an exhibit of the same to the second party, which amount, with an additional ten per cent., shall be fixed as the compensation which the party of the first part shall be entitled to receive from the second party as compensation for the work done and materials furnished under this contract.

And the second party, in consideration of the premises, hereby agrees to and with the first party to pay them for doing said work and furnishing said material the actual cost thereof and ten per cent. additional on completion of their part of this contract.

619 The second party further agrees that in locating said line of road they will not use a sharper or greater curve than an eight-degree curve without the consent in writing of the first party.

That for the purpose of carrying out this contract the first party may take possession at any time of any of the right of way which has been or may be acquired, including all rights of second party on line of the Chicago and Pacific railroad, and also of all material now owned by said company, such as iron rails, &c., once put down in South Port and Jones avenues in the city of Chicago.

That second party will not, during the continuance of this contract, sell or incumber its property or any part thereof by lease, mortgage, trust deed, or otherwise without the consent of the first party, nor, without their consent first obtained in writing, contract any debts or make any contracts of any kind or for any purpose; and it is hereby further agreed that the contract this day entered into by authority of the board of directors with William C. Goudy in regard to procuring the right of way for said company and other matters therein contained was made with the said first party's express consent, and the second party hereby agrees not to alter, change, or annul said contract during the continuance of this con-

tract or release said Goudy from any of the provisions thereof without the consent, in writing, first obtained of the first parties.

If the party of the second part shall fail to perform any of the agreements provided herein to be performed by it or if the party of the first part shall at any time during the progress of said work be prevented, by final decision of the supreme court of the State or of the United States, from laying or using any part of the track of said road, then, upon such failure or decision, the party of the first
620 part may absolutely discontinue the performance of their said agreements herein, unless the party of the second part shall obtain new right to lay or use said track or part of track, and party of the second part shall pay them for the labor and materials already furnished and all damages suffered by them, and the party of the first part shall have a lien on all the property and franchises of said company therefor.

In witness whereof the parties of the first part have hereunto affixed their signature, by A. B. Stickney, and the party of the second part has caused this article of agreement to be executed by its president and secretary and its corporate seal to be hereto affixed the day and year first above written.

A. B. STICKNEY & CO.,
By A. B. STICKNEY.
[SEAL.] THE CHICAGO AND EVANSTON RAILROAD COMPANY,
By W. C. GOUDY, *Pres't.*

GEORGE CHANDLER, *Secretary.*

Feb'y 25, '85.

(Endorsed:) It is admitted by counsel of compl't & def'ts that the within are the genuine original contracts, copies of which are attached to the bill, marked A, B, & C. Wm. H. Bradley, clerk. Filed Feb'y 25, 1885. Wm. H. Bradley, clerk.

621 United States Circuit Court, Northern District of Illinois.

TUESDAY, *October* 14, *A. D.* 1884.

Present: Hon. Henry W. Blodgett, district judge.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

Now come the parties, by their solicitors, and, by consent, it is ordered that the exceptions filed herein to the answers of Julius Wadsworth, Hugh T. Dickey, J. Millbank, James Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller, and Selah R. Chamberlain be, and the same are hereby, overruled, and, on motion of Mr. Ela, William A. Spencer, of St. Paul, Minnesota, is hereby appointed special examiner herein, under the amended

sixty-seventh rule, in equity, of this court, to take the testimony of A. B. Stickney and James J. Hill.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify
622 the above and foregoing to be a true and correct copy of the order entered of record in said court on the 14th day of October, A. D. 1884, in the cause wherein James J. Hill is complainant and The Chicago and Evanston Railroad Company *et al.* are the defendants, as the same appears from the original record thereof now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office, in Chicago, in said district, this 17th day of October, A. D. 1884.

WM. H. BRADLEY, *Clerk.*

United States Circuit Court, Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.*

Pursuant to an order duly made and entered herein on the 14th day of October, 1884, I, the undersigned, the special examiner duly appointed in and by said order, do hereby designate and appoint Monday, the 27th day of October, 1884, at 10 o'clock a. m., as the time and my office, in the custom-house, in the city of St. Paul, Minn., as the place for the taking the testimony of A. B. Stickney and James J. Hill in the above-entitled cause pursuant to the directions of said order.

And I do hereby order that notice of the time and place designated for taking such testimony be served on the defendants or their solicitors forthwith.

Dated St. Paul, October 18th, 1884.

WM. A. SPENCER,
Special Examiner, &c.

623 In the United States Circuit Court for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO — EVANSTON RAILROAD COMPANY *et al.* } In Chancery.

To the defendants and their solicitors:

You are hereby notified that William A. Spencer, Esq., who has been appointed special examiner to take testimony in above cause at the city of St. Paul, State of Minnesota, has entered an order that the testimony of James J. Hill and A. B. Stickney, witnesses on the

part of the complainant in said cause, will be taken before him, at his office, in the custom-house, in said city of Saint Paul, on Monday, the 27th day of October, 1884, commencing at ten o'clock in the forenoon of said day.

You are also notified that the taking of the testimony of said witnesses in said cause will be commenced and taken before said special examiner at said time and place and continued until completed, at which time and place you are entitled to be present and cross-examine said witnesses if you see fit so to do.

GORDON E. COLE,
ELA & PARKER,
STILES & LEWIS,
Solicitors for Complainant.

STATE OF ILLINOIS, } ss:
Cook County, }

FRANK R. GLOVER, being first duly sworn, on oath says that on the 18th day of October, 1884, he served the within notice on W. C. Goudy, Edwin Walker, and Jno. N. Jewett, solicitors for de-
624 fendants, by leaving a true copy thereof at the office of each of said solicitors, at Chicago, Illinois, with a clerk of each of said solicitors and at same time informing said clerk of the contents thereof.

FRANK R. GLOVER.

Subscribed and sworn to before me this 21st day of October, A. D. 1884.

[SEAL.] FRANK A. MOORE,
Notary Public.

U. S. Circuit Court, Northern District of Illinois.

J. J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY, W. C. GOUDY, *et al.*

Take notice that you are required to produce, to be put in evidence, before W. A. Spencer, examiner in chancery, at his office, in the custom-house, in the city of St. Paul, Minnesota, on the 27th day of October, 1884, at 10 o'clock in the forenoon of that day, the following papers: Telegram, bearing date August 27, 1881, from A. B. Stickney to W. C. Goudy; telegram, bearing date August 29, 1881, same to same; letter, bearing date St. Paul, Feb'y 6, 1882, from J. J. Hill to S. S. Merrill; & upon your failure to produce them complainant will introduce secondary evidence of their contents.

Dated Oct. 11, 1884.

Truly,
GORDON E. COLE,
625 *Sol. & of Counsel for Complainant.*

To W. C. Goudy, Esq., def'ts' solicitor.

STATE OF ILLINOIS, } ss:
Cook County, }

FRANK R. GLOVER, being first duly sworn, on oath says that on this 21st day of October, 1884, he served a notice (of which within is a true copy) on W. C. Goudy, at Chicago, Illinois, by delivering said notice to said Goudy personally.

FRANK R. GLOVER.

Subscribed and sworn to before me this 21st day of October, 1884.

J. FRANK RICHMOND,
[SEAL.] *Notary Public in and for said Cook County.*

Filed by me October 27, 1884.

WM. A. SPENCER,
Special Examiner.

United States Circuit Court, Northern District of ——.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } In Equity.

Depositions of A. B. Stickney and James J. Hill, witnesses of lawful age, produced, sworn, and examined before William A. Spencer, special *H. E. Mann and* examiner in chancery of said court, on behalf of the complainant, commencing at 10 o'clock in the forenoon on the 29th day of October, A. D. 1884, at his office, in
626 the United States custom-house, in the city of Saint Paul, in said district.

Present: Gordon E. Cole, Esq., solicitor for plaintiff; George Chandler, solicitor for defendant.

JAMES J. HILL
vs.
THE CHICAGO & EVANSTON RAILROAD COMPANY. }

Gordon E. Cole, Esq., complainant's solicitor; George Chandler, Esq., solicitor for defendant, Wm. C. Goudy.

Testimony taken before Wm. A. Spencer, examiner, Monday, October 27th, 1884, 10 o'clock a. m.

A. B. STICKNEY, a witness called on the part of complainant, being first duly sworn, testifies as follows:

Direct examination—questions by Mr. COLE:

Q State your name, age, occupation, and place of residence.
A. A. B. Stickney; 44 years old; residence, St. Paul, Minn.; I am engaged in railroad construction.
Q. Do you know the defendants in this suit?
A. Who are they?
Q. There is the North Chicago City Railway Company, the Chi-

cago & Evanston Railroad Company, W. C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah. J. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill; subsequently there were added Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, Jas. T. Woodward, and E. L. Frank—those were of the State of New York; Wm. Rockefellow and S. Chamberlain, of
627 the State of Ohio, and George Smith, of London, England.

A. I know some of them and some I do not. I know Goudy. I think I have seen Volney Turner. I have met Mr. De Koven. I know George Chandler. I know Wadsworth and one Walker by reputation. I do not know Hubbard, Chase, Buckingham, and Johnson. Easton and Merrill I do know; do not know Julius Wadsworth. I do not know Dickey. I do not know Milbank, Stillman, Woodward, Frank, or Rockfellow. I know S. Chamberlain. I do not know George Smith.

Q. Please state whether you ever had any negotiations with any of these parties with reference to the contract for the building of the Chicago & Evanston railroad, so called.

A. Yes; I did.

Q. State with whom and when that negotiation took place—when it began.

A. With W. C. Goudy. Mr. Chandler was present when most of the negotiations were made. Volney C. Turner was present during part of the negotiations.

Q. Who was Volney C. Turner?

A. He was president of the North Chicago City railway.

Q. Any one else present?

A. Do you mean of those defendants?

Q. Yes.

A. No; as far as I remember the names. Yes; John De Koven was present during some of the negotiations. That is all.

Q. What time did those negotiations take place?

A. There was a written contract made at the time. My memory is quite defective as to dates. I would like to refer to that (indicating) paper you hold. I think there was three written contracts.

Q. There is no dispute that those bear date May 28, 1880?

A. That was the time the contract was consummated.

Q. I was in negotiation with Mr. Goudy some time before
628 that. It might have been 2 or 3 months; I think it was.

Q. Those negotiations commenced 2 or 3 months prior to the consummation by these contracts?

A. I should think so.

Q. How many interviews did you have with these gentlemen or any of them prior to——

A. I cannot say how many, but several with Mr. Goudy.

Q. Where did those interviews take place?

A. At the Grand Pacific Hotel in Chicago and at Mr. Goudy's office.

Q. At the interviews which took place at the Grand Pacific Hotel was any one present except yourself and Mr. Goudy?

A. There was, at some of them.

Q. Please state what circumstance led up to these negotiations between you and Mr. Goudy; how many came — you to meet Mr. Goudy and enter into these negotiations.

Objected to as incompetent.

A. I was engaged in trying to work up a scheme to build a railroad from St. Paul to Chicago, and was looking around to find some way to get into the city of Chicago, and by chance I discovered this charter of the Chicago & Evanston railroad and an ordinance of the city of Chicago granting it certain rights, and I went to investigate it and I found that Mr. Goudy was the man that represented it, and I sought an interview with Mr. Goudy to see if I could arrange terms to purchase it.

Q. What did you learn through Mr. Turner and Mr. Goudy as to the statute of the ownership, the equitable ownership, of the Chicago and Evanston Railroad Company or its stock?

A. My recollection is that they represented that Mr. Goudy either owned or controlled the stock, but that it was pledged in some way to the North Chicago City Railway Company for money ad-
629 vanced in some way towards the construction of the road or for some other reason. I have not a very distinct recollection how they said the indebtedness was incurred, but that the North Chicago City Railway Co. had a claim of a considerable amount against the Chicago & Evanston Railroad Company I have a very distinct recollection of.

Q. Do you recollect how large that claim was?

A. I do not know, but I think one of the contracts stated.

Q. What was it evidenced by?

A. My recollection is that in the arrangement it was put in the form of a promissory note from the Chicago and Evanston to Turner, of the North Chicago and Evanston Railway Company.

Q. Is that the indebtedness that is referred to in these contracts as being assigned, together with the stock, to De Koven in trust?

A. Yes, sir.

Q. That is the indebtedness which is referred to in the contracts attached to the complaint as being assigned to De Koven, together with the stock of the Chicago & Evanston Railroad Company in trust?

A. Yes, sir.

Q. State as fully as you are able to remember the details of the negotiations which you had with these parties which led up to the contracts which are attached to the complaint.

Objected to.

A. It is extremely difficult for me to answer that question except in a general way. I saw Mr. Goudy and talked with him about it and he represented that he owned or controlled—my recollection is it was about 1,000 shares out of 1,200 of that road. Some one of the contracts, though, will specify the number of shares.

Q. At any rate, it was the number of shares referred to in
630 the contract in trust to De Koven?

A. Yes, sir; and that Mr. Goudy owned some real estate out on the line of the proposed road which he thought would be very greatly benefited by building the road, and that he was anxious to get the road built for the expected profit or benefit that he would make out of the building of the road by the increased value of his land along the line of the road, and, as I said, we met several times.

Q. Let me ask you, at the time Mr. Goudy made the representation to you that he owned and controlled the number of shares of stock which were afterwards assigned to De Koven, was Turner, the president of the Chicago Railway Co., present, and did he or did he not acquiesce to those representations of Goudy?

A. At the time those contracts were assigned or just before they were assigned Mr. Turner was brought into Mr. Goudy's rooms by Mr. Goudy, and we went all over the negotiations in his presence, and he consented to it as we finally agreed.

Q. Did Mr. Turner, as president of the North Chicago Railroad Company, at the time or during any portion of those negotiations hold out to you W. C. Goudy as a person who was authorized to negotiate and make contract with reference to that stock?

A. I so understood it.

Q. And also with reference to the indebtedness which was transferred with the stock?

A. I understood it so. I understood that the indebtedness was put into a note at the time for the express purpose of getting it in shape so it could be transferred.

Q. State whether or not you also understood that by the North Chicago Railway Company the note and stock was placed in the hands of Mr. Goudy to be disposed of at his discretion and best judgment.

631 A. I understood that whatever interest the North Chicago City Railway Co. had in the property was placed in Mr. Goudy's hands at the time for the purpose of making the disposition he did make by the contract he made.

Q. What I desire to get at is this: in case any subsequent modifications of these contracts should have been made was it your understanding that Goudy or the North Chicago Railroad Company had the control or disposition?

Objected to.

A. My understanding was that the North Chicago City Railway Company had no interest whatever in that property except a claim of so many thousand dollars against the railroad company. I never understood and it was never represented to me that the North Chicago City Railroad Company owned a dollar of the stock or had any claim on the stock in any shape or manner; that the Chicago and Evanston Railroad Company owed the North Chicago City Railroad Company whatever the amount stated in the contract was.

Q. Who did you understand had the ownership of that stock subject to that claim?

A. I understood Mr. Goudy had. I think when I first commenced to negotiate with him my recollection is that he claimed some of the stock was outstanding, but that he could secure it and would secure it, and before the arrangements were completed he had secured or he said he could secure.

Q. What was done with the stock which he secured?

A. The outstanding stock? It was put in the contract.

Q. Was there not some stock secured that was not put in the contract?

A. Oh, yes; that was afterwards the contract was made. After the contract was made he purchased a certain number of shares—I do not remember how many shares—for me, which I paid him for.

632 Q. 110 and ⅔, was it?

A. Something like that; yes, sir.

Q. Which he caused to transfer and assigned directly to you?

A. Yes, sir.

Q. At the time that these negotiations were entered into, these contracts entered into, state what the Chicago and Evanston road was, where it commenced and where it terminated, and how much of it had been constructed, if any.

A. If I had the map of Chicago before me or something to refresh my memory from I could state exactly, but the names of these streets have escaped my memory. There was an ordinance of the city council granting to the Chicago & Evanston Railroad Company with the Chicago & Pacific Railroad Company the right to build a railroad in certain streets of the city of Chicago, and there was a portion of that road built, my best recollection is, about a mile—built and owned jointly by the Chicago and Evanston and the Chicago & Pacific Railroad Company; then the ordinance granting to the Chicago & Evanston Railroad Company the right to lay its tracks in certain other streets connection this built portion of the road with the north city limits of the city of Chicago. That is a mile and a half more. It seems to me altogether it is about three miles inside the city of Chicago.

Q. Was there any portion of this road to be built outside of the city of Chicago?

A. Yes; from Chicago to Evanston, about 12 miles.

Q. None of that has been built?

A. No, sir.

Q. Only the mile that was the joint property of the Chicago & Pacific and Chicago & Evanston Railroad Companies had been built?

—. The ordinance from the city of Chicago granted to the Chicago and Pacific R. R. Co. and the Chicago and Evanston R.

633 R. Co. the right to build a railroad in certain streets of the city, commencing at the western limit of the city in from nearly an east and west line until it crosses the Chicago river, then turned pretty sharply to the south and run about a mile or mile and a half in that direction. The Chicago & Pacific R. R. Co. had built the road from the western limit of the city until after it crosses

the Chicago river. Of this portion the Chicago and Evanston R. R. Co., as I understood it, had no interest in the track or superstructure, but had rights in the right of way. After it made the angle after crossing the Chicago river and angle to the south there is about a mile to a mile and a half that the Chicago & Evanston owned a half interest in the superstructure as well as the right of way. The Chicago & Evanston also had the right of way in certain streets, commencing at the angle before referred to and running north to the northern limits of the city in which the Chicago & Pacific had no interest. The Chicago & Evanston R. R. Co. had at one time laid the rails on a portion of this right of way that they had an exclusive interest in, but the citizens had taken it up, and they had more or less materials in the shape of rails laying around there which was the property of the Chicago and Evanston R. R. Co.

Q. You have described all the road that had been built?

A. Yes, sir.

Q. Is there anything further that you recollect that took place pending these negotiations that you are able to state?

A. I do not think of anything else except the making of the contracts themselves.

Q. I notice these contracts were signed by you, A. B. Stickney & Co. Who was the Co.?

A. That was explained to Mr. Goudy at the time that I was not negotiating in that transaction on my own account, but that
634 the parties who were interested in it did not care to have their names used or known at the time, and any money that I paid on the contract was supplied by my associates in the matter, and it was fully understood, I think, by Mr. Goudy that I was simply a representative there, and that the parties in interest were represented by the Co.; how Mr. James J. Hill was the man who furnished the money to pay what was paid to Mr. Goudy under this contract.

Q. Have you since assigned all your interest under this contract to Mr. Hill?

A. Yes, sir.

Q. Prior to the commencement of this action?

A. I do not know when the action was commenced, but I suppose it was.

Q. You know it was before that, don't you?

A. Yes.

Q. Was there any cash paid down at the execution of this contract on the contract?

A. Yes.

Q. How much?

A. I think it was twenty thousand dollars.

Q. By you to Mr. Goudy?

A. Yes, sir.

Q. I understood you to say that Mr. De Koven was present during some portions of these negotiations?

A. Mr. De Koven was made trustee.

Q. What were Mr. De Koven's relations to Mr. Goudy or any

of the other defendants; how did you come to run across Mr. De Koven or of the facts under which he was selected as trustee?

A. Mr. Goudy represented Mr. De Koven as a very responsible, reliable, and proper man to act as trustee. Mr. De Koven was an officer in one of the principal banks there, and I found out his reputation was first-class, and I desired to have a reliable and responsible man to act as trustee, so I made no objection to him acting as such.

Q. You say Mr. De Koven was present during some part of these negotiations—where?

635 A. He was only present at the time Mr. Goudy and I went to the bank to have him accept the trust, and I have forgotten whether he signed any papers accepting the trust or not. I am inclined to think he declined to sign anything. I know Mr. Goudy and I went to the bank and read the contract over to him and explained it to him and asked him if he would accept the trust.

Q. I notice that there are three contracts attached to the complaint—Exhibits A, B, and C. State whether these contracts were all made and entered into at or about the same time.

A. They were.

Q. They were all really a part of the same transactions?

A. I so understood it.

Q. Were these contracts all exhibited to Mr. De Koven at the time the deposit was made?

A. I should say they were. I am not absolutely certain that all of them were exhibited to Mr. De Koven, but I should think they were. I know he went into it very carefully. Mr. De Koven appeared to be a very careful, prudent man, and wanted to fully understand the matter before he assumed any responsibility.

Q. Who went to Mr. De Koven's with you—anybody but you and Mr. Goudy?

A. I think not.

Q. Were any other parties known to Mr. De Koven in this transaction except you and Mr. Goudy?

A. I think not.

Q. There is an agreement attached to the answer of the North Chicago R'y Co. which contains this provision: "This article of agreement, entered into this 28th day of May, 1880, between the North Chicago City R'y Co. and Mr. Goudy, of the second part, witnesseth: That the first party hereby sells to the second party all interest in the stock of the Chicago & Evanston R. R. Co.—about 890 shares and promissory note for $36,847.78—without recourse; that the second party agrees to pay therefor $25,000, as follows." Do you remember of having seen a contract of this kind?

A. I have no recollection of it.

636 Q. You say you have no recollection of having seen that contract?

A. No, sir.

Q. And that statement with reference to the disposition of the stock—to the promissory note—hereby sells to the second party all interest in the stock and promissory note to Goudy without recourse.

Whether that statement as recited in that contract represents the same relations to that stock and note that you *have* were orally informed by Turner and Goudy he held towards it—that is, he held after these agreements were consummated I mean.

A. I do not think I understand what you mean.

Q. This agreement recites that the North Chicago R'y Co. has parted with all their interest in that note and in the stock altogether so as to give Mr. Goudy entire control of it, so if he wanted to make any changes of these subsequent contracts it would be entirely in his power to do it and not in the power of the North Chicago R'y Co. I want to get your understanding and idea as to—after this arrangement was made and this trust approved and this stock put in the hands of De Koven—who afterwards had the right to modify this contract, the North Chicago R'y Co. or Goudy.

A. I never understood from any source that the North Chicago City R'y Co. or anybody else but Mr. Goudy had any interest in that stock whatever. I always understood that he was the absolute owner of it, and, as far as I know, the only reason why Mr. Turner was called into the conference at all was that his company had a claim against the R. R. Co. and he wanted to see whether there was going to be money enough got out of it to pay his indebtedness. I understood that they put that money in Mr. Goudy's hands to manage as he saw fit.

Q. Was there any other consideration for this twenty thousand dollars you say you paid to Mr. Goudy except the stipula-
637 tions and agreements contained in these three contracts?

A. I do not think of any other.

Q. Now these contracts provided for the obtaining of the right of way by Mr. Goudy on or before March 1st, 1881, didn't they?

A. I couldn't remember the dates; the contracts would show, though. (Witness shown contracts.) Yes; I think that is so.

Q. After these contracts were entered into you returned to Minnesota, did you?

A. Yes, sir.

Q. When did you next see Mr. Goudy?

A. I cannot state dates, but I saw him frequently. I frequently passed through Chicago and I always made it a point to call on Mr. Goudy, or at least I intended to, when I passed through the city.

Q. You may state what reports were made by him during the time—intervened between the dates of these contracts and the time when by their terms he was to have the right of way obtained.

A. I had several interviews with Mr. Goudy and asked him how he was getting along in getting the right of way. He represented that he got a good deal of it, but that there was some portions of it that he could not get without condemnation proceedings, and that he would be very seriously embarrassed by our commencing work under the contract before he had completed the condemnation proceedings, and he hoped that we would so manage affairs as to let him get out as easy as we could. He said that the right of way was going to cost him in any event very much more than he expected, and that he had made a bad bargain—was going to lose money—

and wanted us to so time our work and manage affairs as to let him get out as cheaply as he could; that if we commenced work under the contract the property-owners would all see that the work was going to be built and would naturally insist upon getting
638 all they could, and if we didn't commence the work their anxiety to get the road built would be an inducement for them to settle cheaply with him for right of way. He hoped to get most of the right of way given him—that is, the time he made his contract. The last time I saw Mr. Goudy on this matter before he repudiated his contract he very particularly requested me to give him more time to get the right of way.

Q. About what time was that?

A. That was about the time that the time was expiring. I told him certainly we would give him all the reasonable time he wanted; that under the terms of the contract we might be liable to forfeit our interest if we did not make payment within a certain time. I told him that if we gave him some time we should want him to waive that condition of the contract. He said he would do it. I asked him if he would write a letter to me to that effect. He excused himself for the time being, saying he was busy then, but would write me such a letter and forward it to me at St. Paul.

Q. Did he ever do so?

A. I never received it.

(Witness handed a telegram.)

Q. That, I believe, is the first communication you received from him in writing or by telegraph?

A. It is.

Q. That is a telegram you received from Mr. Chandler and a true copy of your answer to it?

A. Yes, sir.

Complainant's counsel introduces in evidence the telegram above referred to, with the answer endorsed thereon, which is marked Complainant's Exhibit "A" and herewith returned.

(Witness handed letter.)

Q. Is that the next communication, as near as you remember?

(Said letter introduced in evidence and herewith returned,
639 marked Complainant's Exhibit "B.")

A. I remember of receiving this.

Q. Do you know Mr. Goudy's handwriting?

A. Yes, sir.

Q. During the time you were having these oral interviews with Mr. Goudy occasionally and up to March, 1881, did you receive from him any written communication that you remember of except those that I have already called your attention to?

A. I do not remember of any.

Q. After the time when you say that by mutual agreement the time for obtaining right of way was extended you received various letters and communications by telegraph from Mr. Goudy, did you not?

A. Yes, sir.

Q. As far as you remember, is the communication I now hand you the first you received after the time was extended?

(Witness handed letter.)

A. It is extremely difficult for me to remember.

Q. I will ask you whether at the time that you gave directions or whether at the time you advised with me with reference to the commencement of this suit it was not your intention to hand to me all the communications that had passed between you and Mr. Goudy on this subject.

A. I made search of my letter books and telegrams to find everything that had passed between us in the shape of letters and telegrams, and I turned over to you everything I found.

Q. Among those turned over that is, in order of time, the first letter that you received after the extension that you have sworn to?

A. I think so.

Said letter offered in evidence, which is herewith returned and marked Complainant's Exhibit "C."

640 Q. You received that from Mr. Goudy?

A. I did. The next communication which passed between us in order of time is a telegram which I sent to Mr. Goudy, of which this is a copy:

"ST. PAUL, MINN., *Aug.* 27, 1881.

"W. C. Goudy, 162 Washington street, Chicago, Illinois:

"Have you got the right of way matter all settled so that I can go to work on construction at once? Answer.

"(Signed) A. B. STICKNEY."

To which Mr. Goudy replied by telegram.

Copy of said telegram offered in evidence and herewith returned, marked Complainant's Exhibit "D."

I replied to that telegram as follows—I have a copy of the reply in my hand:

"ST. PAUL, MINN., *August* 29, 1881.

"To W. C. Goudy, 162 Washington street, Chicago, Illinois:

"No objection to your taking more time to secure right of way, but in that case you must not expect us to commence work until next spring.

"(Signed) A. B. STICKNEY."

Copies of the two telegrams from Mr. Stickney to Mr. Goudy are introduced in evidence, marked Complainant's Exhibit "E," and herewith returned.

Q. Have you the next written communication that passed between Mr. Goudy and yourself?

A. Yes, sir.

(Witness hands complainant's counsel letter.)

Q. That you received from Mr. Goudy September 1st?

A. Yes, sir; I was at Winnipeg at the time that September first letter came, and it was forwarded me.

Letter of Sept. 1st introduced in evidence, marked Com-
641 plainant's Exhibit "F," and herewith returned.

My next communication from Mr. Goudy was this letter, September 14th. I think I answered this letter by going there in person and having a personal conversation with Mr. Goudy.

Letter of Sept. 14th introduced in evidence and marked Complainant's Exhibit "G" and herewith returned.

Q. State what that conversation was.

A. We talked over on what terms we would allow the Milwaukee & St. Paul Company to occupy the right of way referred to there jointly with us. I think that the result of the conversation was that I authorized Mr. Goudy to make an arrangement with that company to occupy that 1,500 feet jointly with us by paying this $40,000 for the privilege.

Q. About what time, as near as you can recollect, did that conversation occur?

A. Very shortly after I received that letter, Sept. 21st. It might have been the 1st of October, 1881; it might have been later than that.

Q. At the time of that conversation with Mr. Goudy, in what condition of progress was the right of way that he was obtaining?

—. I still understood him that he was still asking for more time to get the right of way.

Q. Did you assent or dissent to his continued application for more time?

A. I assented.

Q. When was the next interview or communication you had either with or from Mr. Goudy?

A. It was some time later in the fall; I have no way of fixing the date. I had been to Montreal and was returning. I should think it was probably in December; it might have been in January of the following year. It was the last of December or in January of the following year.

Q. That was an oral conversation, was it?

A. Yes, sir.

642 Q. Where did that take place?

A. That took place at his office in Chicago.

Q. State what transpired there.

A. It was a repetition almost of our former conferences that the right of way was a great deal more difficult to get than he expected; that it was costing him more money than he expected; that he thought he would have it ready to commence work on in the spring.

Q. Did you assent or dissent to his taking that time?

A. We consented; we had already consented by telegraph.

Q. That consent never was withdrawn?

A. No, sir.

Q. When did you next hear from Mr. Goudy in regard to this matter?

A. Directly or indirectly?

Q. Either.

A. I think this telegram I have here was the next communication I had from Mr. Goudy. I would not say but what I called on him in the meantime. I remember the way I fixed that date in December or January was that during 1881 I was employed on the Canadian Pacific road and I had arranged to discontinue my connection with the Canadian Pacific road and went on to Montreal in December to close up some business that I had with them to turn over the road to my successor. On my return I remember of calling on Mr. Goudy in regard to this matter. Whether I called on him again during the winter I have no way of fixing it in my mind distinctly.

Q. If you did, did you at any time receive any notices from him that you had completed the obtaining of the right of way?

A. No, sir.

Q. Did you at any time receive from him or did he ever offer to furnish you any evidence of the completion of his contract in obtaining the right of way?

A. No, sir.

Q. Did he ever intimate to you that he had forfeited and failed to perform his contract and make any claim that by that
643 reason you had forfeited your rights under the contract? I men up to this time.

A. No, sir; never until the spring of 1882.

Q. Did you prior to the receipt of that telegram in the early part of May, A. D. 1882, have any intimation from Mr. Goudy that the arrangement between you and him whereby an extension had been granted to him on your part to obtain the right of way at his request was not still a continuing understanding?

A. No, sir; no manner, directly or indirectly.

Q. Who was that telegram from you hold in your hand?

A. Thomas Lowry.

Q. Who was he?

A. He resides at Minneapolis.

Q. What did he have to do with this matter?

A. He had nothing to do with it.

Q. How came he to be interesting himself in the matter?

Objected to.

A. Except that shortly before this dispatch was sent I asked him if he didn't want to become interested in the Chicago & Evanston enterprise and explained to him what we had there, and he was going East and he said he would call upon Mr. Goudy and talk the matter over with him, and he did so and sent me this telegram.

Telegram introduced in evidence, marked Exhibit "H," and herewith returned.

Q. That is the first intimation you ever had that Mr. Goudy claimed the contract was off?

A. Yes, sir.

Q. Mr. Lowry is president of the Minneapolis Street Railway Company or was at that time, was he not?

A. Yes, sir.

Q. When did you next have any direct communication or information from Mr. Goudy with reference to the matters in controversy?

644 A. I do not now remember whether I had any communication with him before he came up here or not. It seems to me I did. I am not exactly certain.

Recess until 2 o'clock.

2 O'CLOCK.

Direct examination of A. B. STICKNEY by Mr. COLE continued:

Q. To refresh your recollection, did you not shortly after you received this telegram from Mr. Lowry—was you not on your way East and did you not call at Mr. Goudy's office?

A. My impression is I saw Mr. Goudy in Chicago shortly after receiving this telegram from Mr. Lowry, but I am in no way positive of it.

Q. When have you a definite recollection of having an interview with Mr. Goudy next?

A. When Mr. Goudy came up here. I cannot tell when. I should think it was a week or ten days before I made an assignment of my interest in that thing to Mr. Hill. This assignment is dated the 19th of August, 1882. I should say it was a week before that. It might have been three days; it might have been ten days.

Q. Please state in detail as briefly as you can that interview—what you said and what he said. Where did that interview take place?

A. At my office, at Mr. Hill's office, and on the street.

Q. Who was present at any of those interviews besides yourself and Mr. Goudy?

A. I think Mr. R. B. Angus and Mr. Hill. It seems to me Mr. Stephen also.

Q. State all you recollect. I want to get that interview as fully as I can.

A. The interview commenced at my office, I think, by a proposition by Mr. Goudy to pay a certain sum of money to be released from all claims which we had under the contract.

Q. What was that sum of money?

645 A. To the best of my recollection, it was about $7,500; somewheres along there.

Q. What reason did Goudy give for wanting to settle all your claims under the contract, for which you had paid twenty thousand dollars, for seven thousand dollars?

A. He said he was unable to pay more. He had spent part—most of the money—and that was all the money he could raise.

Q. State fully all he said.

A. It is not so easy to retain a conversation like that.

Q. What reason, if any, did he assign why it was better for you to take seven thousand dollars than to attempt to enforce the payment of any more, if any?

A. Oh, he assigned various reasons in the course of his conversation. One of them was that we had forfeited our contract and had no legal rights that we could enforce. In the second place, that if we could enforce the matter and get a judgment we could not collect the judgment. He was not in a position to be compelled to pay anything if we got a judgment against him.

Q. What response did you make in reply to his claim that the contract was forfeited?

A. I told him that I didn't consider the contract forfeited by any means, and that whatever delay there had been on our part had been at his request and as a matter of accommodation to him, and that I did not think that the court would allow him to take advantage of his own wrong-doing. I told him that as to a compromise of the matter that was something he would have to talk with the parties really interested, if he wanted to compromise; that I would take him down and introduce him to Mr. Hill, who was really the party interested, and that he might talk that matter over with Mr. Hill, and I did so.

Q. What took place at Mr. Hill's office?

A. It was not a very pleasant interview. Mr. Hill very
646 decis-ly declined to accept $7,500, and my recollection is that there was considerable bad temper displayed on both sides.

Q. Anything further?

A. There was a great deal said.

Q. What was said or done with reference to any offer to perform on your part and the demand of performance on his part?

A. My recollection is that Mr. Hill said he was ready to perform the contract on his part and he expected Mr. Goudy to do the same.

Q. With reference to a readiness in case Mr. Goudy did not see fit to go on and perform his contract, you remember the alternative that you was to pay $25,000 instead of 40,000 in case Mr. Goudy did not perform. What, if anything, do you remember being said by yourself and Mr. Hill as to a readiness to perform the latter branch of the contract—that is, to pay the $25,000 in case the stock and note could be assigned to you or Mr. Hill?

A. I have no recollection about that.

Q. State whether or not Mr. Goudy at that interview informed you that the trustee De Koven had delivered the stock and promissory note to the defendants' attorneys.

A. I cannot say whether he did at that interview or not. My memory is not entirely clear as to whether I met Mr. Goudy in Chicago before this interview and after the time that I received that dispatch from Mr. Lowry or not. It was either at this interview in St. Paul or one I had with him in Chicago in which I learned that fact.

Q. Who did you learn it from?

A. Mr. Goudy.

Q. At either of these interviews did you request of Mr. Goudy that said stock and note and the control of the Chicago & Evanston R. R. Co. should be transferred to you, as in the contract provided, and did you offer to perform the contract on your part upon the delivery of the stock and the note?

647 A. I think I told Mr. Goudy that we claimed that the contract was a valid and existing contract and that we should require him to turn that stock over to us and we were ready to go ahead and fulfill the contract on our part and expected to do so.

Q. Have you stated the substance of those interviews as near as you remember them?

A. Yes; as far as I recollect them now.

Q. At the time that the contracts A, B, & C, which are attached to the complaint, were executed—one being the contract between the Chicago & Evanston R. R. Co. and yourselves, A. B. Stickney & Co.; another between Mr. Goudy and the Chicago & Evanston R. R. Co., and another between Mr. Goudy and A. B. Stickney & Co.—who was president of the Chicago & Evanston R. R. Co.?

A. Mr. Goudy, as I understood it.

Q. Who was secretary?

A. Mr. Chandler.

Q. His late partner?

A. Yes, sir.

Q. And at that time who acted as attorney for the North Chicago City Railway Co.?

A. In conference with Mr. Goudy he stated to me that he was.

Q. That was at the time these transactions were pending?

A. Yes, sir.

Q. The contract between the Chicago & Evanston R. R. Co. and yourself was executed on the part of that company by whom?

A. It was executed by Mr. Goudy as president and Geo. Chandler as secretary.

Q. Another of the contracts which constituted a part of that transaction was a contract between Mr. Goudy and the Chicago & Evanston R. R. Co., was it?

A. Yes, sir.

Q. And that contract was adopted and made part of the contract between yourself and the Chicago & Evanston R. R. Co.?

A. The contract between myself and Mr. Goudy?

Q. Yes, sir; by whom was the contract between the Chicago & Evanston R. R. Co. and Mr. Goudy executed on the part of the company?

A. This printed copy shows it was executed by V. C. Turner.

648 Q. What relation did V. C. Turner hold to the Chicago & Evanston R. R. Co.?

A. I am sure I don't know.

Q. What did you understand at the time these transactions were pending?

A. I have no distinct recollection about that, except I had the general impression that the Chicago & Evanston R. R. Co. and the

North Chicago Railway Co. was practically one and the same set of men.

Q. Where was the office of the Chicago & Evanston Railroad Company?

A. As far as I know it was in the office of Goudy & Chandler.

Q. Who acted and represented in all these various transactions all these various interests—the North Chicago City Railway Company, the Chicago and Evanston R. R. Co., and W. C. Goudy?

A. Mr. Goudy was the man I made all my negotiations with.

Q. Who drew the contracts?

A. I guess Goudy, Chandler, myself, and several clerks all had a hand in it.

Q. Did anybody else besides Goudy, Chandler, and yourself have any hand in making or dictating the terms of these contracts?

A. I think not, as far as I know.

Q. Were you aware of any other contract having been entered into affecting these transactions at that time?

A. None whatever.

Q. To get a little more definitely at the position of this man Turner with reference to these transactions, I want to know whether Turner's attitude was that of a party taking any part in shaping and arranging this scheme and these contracts, or was it that of a person who simply acquiesced in whatever Goudy, as the attorney of the interests represented by him and all the varied interests involved, thought best?

A. Turner didn't cut much of a figure in the matter anyway. I never saw him but once there, and then I do not think he was present more than two minutes during the negotiations. My rec-
649 ollection is that I went into Mr. Goudy's office there one day and there was a gentleman there that he introduced to me as Mr. Turner.

Q. In whose actual possession was the certificates of this 870 odd shares of stock that was transferred to De Koven and the note purporting to run to the North Chicago City Railway Company before they were delivered to Mr. De Koven?

A. They were in the possession of Mr. Goudy.

Q. Were they at any time during any part of these negotiations, as you understood, in the possession of any other party than in the possession of Mr. Goudy prior to the time of their delivery to Mr. De Koven?

A. Not to my knowledge.

Q. By whom were they delivered to Mr. De Koven?

A. By Mr. Goudy.

Q. Were any verbal instructions given to the trustee, Mr. De Koven, or other instructions other than those contained in the contracts A, B, & C?

A. Not as far as I know.

Q. What did you know at the time that Mr. Goudy was up here trying to effect a compromise with you in regard to the Chicago, Milwaukee & St. Paul being in negotiation for the purchase of this property?

A. I do not know anything about that except I might have heard some rumors or talk of that kind.

Q. You stated, I believe, that you knew S. S. Merrill?

A. Yes.

Q. What relation does he bear to the Chicago, Milwaukee and St. Paul Railroad Company?

A. He is general manager.

Q. You stated you knew J. E. Easton?

A. Yes.

Q. What relation did he bear to the Chicago, Milwaukee & St. Paul R. R. Co.?

A. I think he is a director in the company.

Q. One of the large stockholders?

A. Yes, sir; I so understand.

Q. You know S. Chamberlein (or Chamblien)?

A. Yes, sir.

650 Q. What relation did he bear to the Chicago, Milwaukee and St. Paul Railroad Company?

A. I think he was a director in the company.

Q. Do you know Julius Wadsworth?

A. Only by reputation.

Q. Do you know what relation he bears to that company?

A. He is understood to be the vice-president, and, I think, is a director.

Q. Milbank.

A. I frequently heard his name in connection with the Chicago, Milwaukee and St. Paul road, but I do not know his relations towards it.

Q. After these attempts at negotiations between you on the part of Mr. Goudy failed what time did you say you thought he was here?

A. I think it was some time the latter part of August.

—. What steps did you take after that interview?

A. I assigned my interest in the contract to Mr. Hill.

Q. Do you know whether directions were given for the preparation and filing of a bill in equity immediately — bringing suit?

A. I do not know.

Q. What further communications took place between the parties purporting to represent the Chicago & Evanston R. R. Co. and yourself?

A. I don't remember of any since that time.

Q. Did you receive a notice and assessment on the stock towards the amount of its full value?

A. I assigned that immediately to Mr. Hill.

Q. Do you remember of receiving such a notice?

A. It seems to me I did receive a notice like that.

Q. Look at these two notices and see if you remember receiving those.

(Witness handed papers.)

A. I remember of receiving some such notices as this. I presume those are the ones, but I cannot say.

651 Q. Do you recollect of receiving any other notice purporting to come from the Chicago & Evanston R. R. Co. or any one representing them, except those to which your attention has been called?

A. I do not recollect of any other. There might have been one or two others, but I cannot recall now what they were or whether there was any or not.

The two notices referred to introduced in evidence and marked Complainant's Exhibit "I" and herewith returned.

Cross-examination—questions by GEO. CHANDLER, Esq.:

Q. Did you ever have any conversation with Mr. Goudy except at his office at Chicago or the Grand Pacific Hotel, except when he was here in August?

A. I do not now recall any.

Q. Did you ever see him at any time — other place than in Chicago and here at any time?

A. I do not recollect that I did.

Q. After the contracts were made, May 28, 1880, when did you first see Mr. Goudy?

A. It is impossible for me to fix those dates. I have nothing to fix them by. I simply know that I was going back and forth between here and Chicago quite frequently, and I have a recollection that I usually called upon Mr. Goudy every time I was in Chicago.

Q. Have you any recollection of being there and seeing Mr. Goudy from the time the contracts were made in May, 1880, to April, 1881?

A. I couldn't say. I cannot recall definitely, but my impression would be that I saw him several times. I couldn't now fix on any number of times.

Q. Where were you principally during that time, the summer and fall and winter of 1880?

A. I recall now where I was. I went to Winnipeg in the spring of 1881—I should say possibly from the 1st of Jan., 1881, until late in the fall, probably December; that I did not call on Mr.

652 Goudy. It is impossible for me to fix those dates in my mind.

Q. You wrote him on the 26th of December, 1880?

A. It is extremely difficult for me to remember those dates. There is only occasionally a date that I can feel any way certain about. I cannot say positively whether I saw Mr. Goudy after those contracts were executed before the following winter or not.

Q. You say you saw him before April, 1881?

A. I should think I did, but I am not entirely positive about that.

Q. Were you in Chicago in April, 1881?

A. That I cannot say. I was in Chicago several times between the 1st of December, 1880, and, say, May, 1881. I was in Chicago several times.

Q. Did you always call to see Mr. Goudy when you were in Chicago?

A. I couldn't say positively that I never went there without calling on him, but my recollection is that I did call on him whenever I was in Chicago.

Q. Where did you stop when you were in Chicago?

A. The Grand Pacific Hotel.

Q. Always?

A. I think so.

Q. Then the registry of the Grand Pacific Hotel would show the number of times?

A. It would be very likely to.

Q. Can you tell when you first had any conversation with Mr. Goudy in regard to the extension of time carrying out the contract?

A. My impression is that it was after this correspondence commenced. My recollection is that we never asked for any extension of time. We simply consented to extensions which he asked.

Q. You have testified as to having several conversations with Mr. Goudy in regard to having an extension of time wherein he could carry out his part of the contract. Can you fix any of the dates in which you had any of those conversations?

653 A. I feel certain that I was in Chicago in February and March, 1881, both, and I feel certain that at both of these times I called upon Mr. Goudy about this matter; talked with him about it.

Q. You don't remember whether you saw him in April or not?

A. No; but I should think I did.

Q. Were you there any time after April 13th, prior to September 27th, 1881?

A. I should think probably. I do not know about April 13th, but I think I was there in April. I should think probably that after April I was not there. I do not recollect now that I was there until along in the fall.

Q. Were you coming there or reaching there on the 27th day of September, 1881, and remaining there until the 30th of September, 1881, and was not that the time that you spoke of when you had a conversation with Mr. Goudy in which you requested him to write a letter, the conversation you speak of as being about the 1st of October?

A. That might have been.

Q. Were you there more than once about that time?

A. I do not remember that I was.

Q. If you were there at that time you stopped at the Grand Pacific, did you not?

A. Yes, sir.

Q. Do you remember when you were there next?

A. No; I cannot remember those dates.

Q. I think you have already testified you were there in December?

A. I think I was there in December. It must have been either in December or early in January.

Q. Were you there on the 19th of December, 1881?

A. I couldn't say whether it was the 19th.

Q. Were you there more than once in December, 1881, or January, 1882?

A. I know that I went down from Montreal and back. I think it was during December. That is my best recollection about it.

654 Q. For the purpose of refreshing your recollection about that, were you not there about the 19th of December, and did you not at the time intend to come there and spend practically the month of January in Chicago?

A. I believe that there was some talk of that kind; that I told Mr. Goudy at one time when I was there that I expected to devote the principal part of my time next month to that matter; whether it was at that particular time or not I cannot remember.

Q. Is it not a matter of fact that you did not come down the succeeding month?

A. As a matter of fact I did not stay there a month.

Q. Did you come at all in January?

A. I could not say.

Q. Were you there only once in December?

A. I was there twice whatever month it was; whether December or January I cannot say.

Q. Once was in September and the other in December, was it?

A. No; I was East and passed through Chicago going down and coming back.

Q. Did you see Mr. Goudy both times?

A. I would not say definitely.

Q. Were you in Chicago in January, 1882?

A. I do not know whether it was December or January, or whether it was both that I was there; it was either in December, 1881, or January, 1882.

Q. You testified, in your direct examination, that you went to Chicago in answer to a letter of Mr. Goudy of September 14th, which was made an exhibit; that you went there to answer it in person. Was not that from September 14th to the first of October?

A. Yes, sir.

Q. Then you saw him next in December, as I understood it.

A. Yes, sir.

Q. Were you not there the January following that, when you did not see him?

A. It is quite possible. I could not say as to that.

Q. Did you ever see Mr. Goudy after you received the
655 Lowry telegram until Mr. Goudy was here in August?

A. That I am unable to say.

Q. Do you remember seeing him at any time after you met him there in December, 1881, until you met him here in August?

A. I cannot say definitely whether I did or not.

Q. Did you receive a letter from Mr. Goudy dated Jan. 5th, 1882?

A. I do not think I did. I may have received one, but I do not think I did.

Q. If you received any such letter what has become of it?

A. At the time this correspondence was going on I was traveling almost continuously, and the letters that related to the business that I had immediately in charge (things that appertained to the Canadian Pacific road), they were filed there. Letters that didn't appertain to that I usually put in my pocket, and I always intended when I got home to have them filed, but a great many letters, I dare say, got misplaced and lost.

Q. You do not know now where any such letter may be?

A. No, sir. When I got this telegram from Mr. Lowry I set a clerk of mine to work overhauling my papers to find all letters, etc., that appertained to the matter and to pick them up, and I got them all together, and this letter, too, I find. Now, then, this letter you refer to is written after that.

Q. Did you ever write a letter to Mr. Goudy yourself after receiving that Lowry telegram?

A. I have no recollection of it. I should think I naturally would have written a letter to him.

Q. You have no recollection of making any reply to it?

A. No, sir.

Q. If you have you are not now able to produce it?

A. No, sir.

Mr. CHANDLER: I will ask the counsel for the complainant to produce a letter written by Mr. Goudy to Mr. Stickney or to A. B. Stickney & Co., dated June 5th, 1882 (or about that date), for the inspection of the witness.

656 Mr. GORDON E. COLE: Counsel for complainant denies having any knowledge of any such letter.

Redirect examination—questions by Mr. COLE:

Q. This telegram which appears to bear date in 1881 was sent in May, 1882, was it not?

A. Yes, sir.

Q. To fix your recollection, do you remember of being in Chicago at the Grand Pacific Hotel with Mr. Hill in December, 1881, or January, 1882, and introducing Mr. Goudy to him?

A. It is absolutely impossible for me to fix all those dates. I have been in the habit of going to Chicago frequently and meeting so many there. I remember of being there upon several occasions with Mr. Hill.

Q. I will ask you now, after this cross-examination, are you still positive, prior to the time when the contract for procuring the right of way expired by its terms March, 1881, you had an interview with Mr. Goudy in which he requested and you consented to an extension of the time for the performance of the contract on his part?

Objected to.

A. I am very strongly of the opinion that I saw Mr. Goudy in February, 1881.

Q. Do you mean to say that you are very strongly of the opinion that you saw him in February, 1881, when he applied for an extension, which was granted?

A. That is my opinion.

The testimony of the witness is suspended to enable him to refer to data to speak more correctly with reference to matters heretofore spoken of.

After examining another witness Mr. Stickney is recalled and asked this question:

657 By Mr. COLE:

Q. Have you refreshed your recollection by referring to any books, papers, or data so as to be able to state more definitely the precise time when the first application by Mr. Goudy for an extension of time was made and granted by you?

A. Yes, sir; I find by reference to a diary that I kept at that time that I arrived in Chicago at 8 o'clock on the morning of February 21st, 1881, from New York, and that I left there on the 23rd of February at 9 a. m. During the time I was in Chicago I called upon Mr. Goudy and asked him how he was getting along in regard to this right of way. He replied that he had not with met the success he expected and didn't know as he would be able to have it all completed at the time the contract called for, and asked me if I would make him any trouble in case he failed. I told him no; we should not make any point on the question of time if he did not. He said it would be impossible to complete his contract by the first of March, and that he should want an extension of time, and I told him that that was all right; he could have any reasonable time he required after that; that we didn't want to make it any more burdensome to him than was absolutely necessary. I called upon Mr. Goudy again on the 13th day of April of the same year, and he still asked for further time, which was granted him.

Q. You find those dates of your being in Chicago in your private diary?

A. Yes, sir.

Complainant's counsel offers in evidence letter-press copy of letter of May 29th, 1882, which is herewith returned and marked Complainant's Exhibit "P."

Q. Did you get any reply from Mr. Goudy to that letter?

A. Am unable to say; am unable to find any. I cannot
658 find any letter from Mr. Goudy answering my letter of May 29th, 1882.

Q. Did Mr. De Koven prior to delivering this stock to Mr. Goudy or the North Chicago City Street R'y Co. ever notify you that it is claimed there had been a forfeiture or that he was about to deliver the stock on the demand of Goudy of the North Chicago City R'y Co.?

A. No, sir.

Q. You never received any communication from him whatever, did you?

A. No, sir.

A. B. STICKNEY.

659 JAMES J. HILL, the complainant in this case, after being first duly sworn, testifies as follows:

Direct examination—questions by Mr. COLE:

Q. Mr. Hill, are you the plaintiff in this action?

A. Yes, sir.

Q. You know who the party was embraced under the denomination "Co." mentioned in this suit with A. B. Stickney & Co.?

A. I was the party.

Q. You were the party who furnished the money?

A. Yes, sir.

Q. How much money did you furnish?

A. I furnished twenty thousand dollars.

Q. To be paid as the advance payment on contracts A, B, & C, which are attached to the complaint, $20,000 as advance payment on the transaction between the Chicago & Evanston R. R. Co. and A. B. Stickney & Co.?

A. Yes, sir.

Q. Has A. B. Stickney's interest in that contract been assigned to you?

A. Yes, sir.

Q. Have you the assignment?

A. Yes, sir.

Q. Was this made and delivered to you before the commencement of this suit?

A. Yes, sir.

Agreement above referred to introduced in evidence and marked Complainant's Exhibit "K" and herewith returned.

Q. You personally had nothing to do with this? You took no part in making the negotiations which resulted in this contract?

A. No, sir.

Q. Do you know W. C. Goudy?

A. I met Mr. Goudy with Mr. Stickney once in Chicago.

Q. Are you able to fix the time, about?

A. I think it was in December, 1881, or January, 1882.

660 Q. Where did you meet?

A. The Grand Pacific Hotel.

Q. By whom introduced?

A. Mr. Stickney.

Q. Did you have any conversations with reference to the matters in controversy here?

A. Mr. Goudy had not at that time succeeded in securing his right of way.

Q. What conversations took place between him and Mr. Stickney in your presence in regard to it?

A. I was not a party to the conversation except in meeting Goudy. He stated that he was going on and doing the best he could to get up this right of way; that he hoped to succeed.

Q. Do you remember what Mr. Stickney said in reply to that?

A. I do not.

Q. Do you remember whether he made any expression of dissent or disapprobation?

A. He made none; I do not remember any.

Q. Did you ever meet Mr. Goudy at any other time?

A. I met him in my office, in St. Paul.

Q. Who was with him?

A. Mr. Stickney.

Q. When was that?

A. That was in the summer of 1882.

Q. In August?

A. I think about the middle of August.

Q. Please state as near as you can remember what transpired on that occasion.

A. I remember that Goudy came there and wanted to dispose of the road or tie it up in contract with other parties, and he made some offer——

Q. Did he state who the other parties were?

A. The Milwaukee and St. Paul railway people.

Q. Now, go on.

A. The contract had been extended *to* from time to time, as represented to me, at his request; that he was under contract to
661 Mr. Stickney and myself for the sale of this property; that the contract had been extended from time to time at his request. Mr. Goudy did not deny this and offered to pay some seven thousand dollars or thereabouts to compromise the matter. I think he spoke of some further sum if he got a favorable settlement with Milwaukee people, and intimated that if we did not take that he was not worth anything and we could not collect from him; that he was not responsible and had no property in his own name. I remember it was a strange statement for him or struck me as such.

Q. Anything more?

A. I do not remember anything further than that I told him we could not accept anything but our contract.

Q. What, if anything, was said by you or Mr. Stickney in the way of making an offer to perform the contract on your part and a demand for the stock and note?

A. We told him that we were ready to carry it out at any time that he could secure the right of way and put us in a position where we could carry it out.

Q. Was there anything said in the way of the alternative branch of the contract that provided for payment in case he did not obtain the right of way?

A. I do not remember definitely what was said in that regard.

My impression is that a tender was made to him at the time, which he refused.

Q. Did you ever have any further interviews with Mr. Goudy?

A. No, sir.

Q. When was the first knowledge or information that you had that Mr. Goudy claimed there had been a forfeiture?

A. I should think about the middle of July.

Q. Of the same summer?

A. Yes, sir.

Q. How were you first informed?

A. By Mr. Stickney.

662 Q. Do you know how Mr. Stickney obtained his information?

A. No, sir.

Q. How long after this interview with Mr. Goudy before you consulted a lawyer and directed suit to be brought?

A. I consulted counsel at once and had the transfer of the entire contract made to myself and instituted suit at once or as soon as it could be done.

Q. Had you any knowledge of any other party in this transaction except W. C. Goudy?

A. Not that I remember. I remember Mr. Stickney reciting to me some of the incidents of the transaction and what this property consisted of, and that there was a street railroad company that had some claim against it which Mr. Goudy cleared up and Stickney had some difficulty or it was a tedious matter to get into shape to make a contract.

Q. You say Mr. Goudy had cleared up. What do you understand from Mr. Stickney or any source in regard to Mr. Goudy's being the sole party in interest and having the absolute right to control the contracts and the property represented by them?

Objected to as incompetent.

A. I understood that Mr. Goudy placed in escrow under contract between 800 and 900 shares of the stock of the Chicago & Evanston R. R. Co., and that by an agreement with Mr. Stickney he was to endeavor to secure some additional outstanding stock. Mr. Stickney, I remember, represented to me that he expected, through Mr. Goudy, to get other stock in addition to the stock that was held in escrow.

Q. Did you or did you not understand that anybody but Mr. Goudy had any right of control or disposition over the property so disposed in escrow?

A. I understood from Mr. Stickney that Mr. Goudy controlled the stock delivered in escrow, and that no person else had to

663 do with it under the contract.

Q. Mr. Hill, of the parties defendant in this suit you say you know Mr. Goudy. Do you know anything about Mr. Wadsworth? Who was T. W. Wadsworth?

A. I do not know him, except by reputation. I believe he is a brother of Julius Wadsworth.

Q. Do you know Edwin Walker?

A. There is an attorney of the Chicago, Milwaukee & St. Paul R. R. Co. by that name.

Q. Do you know E. K. Hubbard?

A. No, sir.

Q. Chase?

A. No, sir.

Q. Buckingham?

A. No, sir.

Q. Johnson?

A. No, sir.

Q. Easton?

A. Yes, sir.

Q. What is his relations with the Chicago, Milwaukee and St. Paul R. R. Co.?

A. He is a director in that company.

Q. Understood to be a very large stockholder?

A. So represented himself to me.

Q. S. S. Merrill—what is his relation to the company?

A. He is general manager of the Chicago, Milwaukee & St. Paul R. R. Co.

Q. Was he at the time you had your interviews with Mr. Goudy in the summer of 1882?

A. Mr. Merrill has been manager for a number of years. I should think at least 10 or 15 years.

Q. Julius Wadsworth?

A. He is vice-president.

Q. H. T. Dickey?

A. No.

Q. Milbank?

A. He is a director.

Q. Stillmand?

A. I have met him in their office at New York. He was represented to me as a very large stockholder in their company.

Q. Woodward?

A. No.

664 Q. Frank?

A. No.

Q. William Rockafellow?

A. He was represented as a director of their company. I met him on an annual excursion of their board of directors two years ago last summer.

Q. At that time and ever since you were and are president of the St. Paul, Minneapolis and Manitoba Railway Co.?

A. I have been president of the St. Paul, Minneapolis and Manitoba R'y Co. for about two years. Before that I was vice-president and general manager.

Q. In those capacities you have occasion to have many business transactions with the official representatives of the Chicago, Milwaukee and St. Paul R. R. Co.?

A. I have known the officers of the company for a long time.

Q. S. Chamblein?

A. He was a director of the Chicago, Milwaukee and St. Paul R. R. Co.

Q. George Smith?

A. By reputation he is a very large holder of their securities. Peter Geddes, of New York, was his agent. Mr. Smith, I think, lives in London or Edingburgh.

Q. Prior to the commencement of this suit and prior to the middle of February, 1882, did you have any conversation or negotiations with the Chicago, Milwaukee & St. Paul R. R. Co. through its general manager, S. S. Merrill, with reference to a sale to them of your interest in the Chicago and Evanston R. R. Co.?

A. I met Mr. Merrill in Chicago and rode from there to Milwaukee with him. I told him the situation in regard to the property; that it would be under the contract built the ensuing summer as far as Evanston as soon as Mr. Goudy completed his right of way
665 matters. Mr. Merrill seemed somewhat surprised when I told him that the Chicago & Evanston R. R. Co. had an interest in the track over which the Chicago & Pacific Division of the Chicago, Milwaukee and St. Paul R. R. Co. ran into Chicago.

Q. That was true, was it? They did have an interest?

A. Yes, sir. Q. After some conversation with Mr. Merrill he thought the Chicago, Milwaukee and St. Paul Co. would like to acquire the Chicago & Evanston property or railroad and asked me on my return to St. Paul to send him a statement of what was covered by Mr. Stickney's contract with Mr. Goudy. On my return to St.Paul I procured a statement from Mr. Stickney.

Q. Is that the statement you procured from him?

(Witness handed statement.)

A. Yes, sir. On my return to St. Paul I procured a statement from Mr. Stickney covering the same points as the contract with Mr. Goudy for the Evanston R. R. Co.

Statement referred to introduced in evidence, marked Complainant's Exhibit "L," and herewith returned.

Q. Did you communicate the contents of that statement to the Chicago, Milwaukee and St. Paul R. R. Co. through Mr. Merrill?

A. Yes, sir; on the 6th of February.

Q. Have you here present the letter-press copy of that letter?

Objected to.

A. I have.

(Witness produces copy.)

Letter-press copy of letter of Feb. 6th, 1882, introduced in evidence and marked Complainant's Exhibit "M" and herewith returned.

Q. I notice in that letter to Mr. Merrill, which is dated in February, 1882, you say that the track is to be built the coming summer. The original contract provided, if I remember, that the right

of way should be obtained in March, 1881, and that if it was
666 not and no payment made within four months of that time there would be a forfeiture. Please explain why it was that you said in this letter that the track was to be completed in the summer of 1882, when by the original contract the time for obtaining the right of way was to expire in March, 1881. State what understanding you had with reference to that and how you obtained it, and when.

Objected to.

A. Mr. Stickney represented to me at different times that he had, on request of Mr. Goudy, extended the time for Mr. Goudy to secure the right of way, and that this was done at Mr. Goudy's request. On one occasion, at least, I remember of Mr. Stickney's bringing either a telegram or a letter from Mr. Goudy to my office asking for an extension of time. After discussing it with Mr. Stickney (he knowing more about the transaction than I did and having direct charge of it) it was decided to grant Mr. Goudy's request and to extend the time to enable him to secure right of way.

Q. Please examine the last telegram on paper marked Exhibit "E." Was that the telegram sent in answer to the telegram to which you refer?

A. That telegram was sent after the matter was discussed between Mr. Stickney and myself. It was thought at the time that if Mr. Goudy did not succeed in getting the right of way before winter that the work would have to be postponed until the following spring, for the reason that owing to frost in the ground it would be more difficult to do the grading.

Q. For that reason that condition was inserted in the telegram, was it?

A. Yes, sir.

Q. Was it by reason of those facts and that understanding that you said to Mr. Merrill that the track was to be built the coming summer?

A. I understood from Mr. Stickney that Mr. Goudy had in-
667 stituted condemnation proceedings to secure portions of the right of way that could not be otherwise secured.

Q. With reference to a telegram in which an extension was granted state as to what was your understanding as to whether that was the first application for an extension that had been made or whether there had been a prior extension.

Objected to.

A. Mr. Stickney told me that Mr. Goudy had had more difficulty than he anticipated in getting the right of way, and that he had to extend the time to enable him to do so, and that this extension of time had been increased from time to time.

Q. How early was it that Mr. Stickney first informed you with reference to March 1st, 1881?

A. I could not say. I think it was either the last half of Decem-

ber, 1880, or the first half of January, 1881, that he told me that Mr. Goudy would not be able to carry out his contract.

Q. Did he at that time state to you that he had concluded there might be an extension?

A. He stated to me that he would extend the time to enable Mr. Goudy to get up the right of way covered by the contract. That was the last half of December, 1880, or first half of January, 1881.

Q. What, if any, caution did you give Mr. Stickney with reference to that, and when was it?

Objected to.

A. I cautioned Mr. Stickney to be very careful in making any extension that was made within the terms of the contract and not to forfeit our right to the contract. Mr. Stickney always assured me that the matter was understood between Mr. Goudy and him-
668 self, and that Mr. Goudy was delayed in getting the right of way, and that the extensions were made on Mr. Goudy's request. Some of those requests I have seen.

Q. Now, did you receive any answer from Mr. Merrill to this?

A. I did.

Q. Is that it?

(Witness shown letter.)

A. Yes, sir; that is Mr. Merrill's letter.

Mr. Merrill's letter introduced in evidence and marked Complainant's Exhibit "N" and herewith returned.

It now appearing that Mr. Chandler does not represent all the defendants, the originals of all the exhibits are returned.

Q. In the original contract, as testified to by Mr. Stickney, or in the original negotiations in Chicago there was an undertaking on the part of Mr. Goudy to procure for Mr. Stickney and transfer to him about 110 shares of capital stock of the Chicago & Evanston R. R. Company which were outstanding in our hands. Do you know whether that arrangement was ever carried out?

A. As I understood him, Mr. Stickney, in addition to the 800 odd shares held by Mr. De Koven in escrow, there were some outstanding shares of stock in the Chicago & Evanston R. R. Company that Mr. Goudy was to secure and deliver to Mr. Stickney. As to whether he was bound to secure any particular number of those shares or not I do not remember, but he was to, at any rate, endeavor to secure this outstanding stock. He did secure some after this.

Q. Do you recollect about what time that was secured?

A. Mr. Stickney, during some meeting I had with him, told me that he had seen Mr. Goudy lately, and that Mr. Goudy had secured a portion of that stock.

Q. That stock has been transferred to you, has it not?

A. Yes, sir.

Q. Is that the certificate?

(Witness handed certificate.)

A. Yes, sir.

669 Q. And the assignment at the bottom?

A. Yes, sir; that is dated Sept. 30, 1881.

Certificate offered in evidence by complainant's counsel, marked Exhibit "O," and herewith returned.

Q. Have you ever had any notice of an assessment made on that stock?

A. No, sir; I have not.

Q. Have you ever had notice of any meeting to increase the stock of the Chicago & Evanston R. R. Co.?

A. No, sir; I have not. The stock was assigned and delivered to me by Mr. Stickney the same day as the contract of assignment of Mr. Stickney's interest in the contract.

Cross-examination—questions by Mr. CHANDLER:

Q. You state that when Mr. Goudy was here some tender was made to him on account of the twenty-five-thousand-dollar matter. What was the nature of that tender?

A. As I recollect, we offered to pay in money.

Q. Upon any condition?

A. The delivery of the stock.

Q. Mr. Hill, you speak of Mr. Stickney having brought to you some telegram from Mr. Goudy requesting the extension of time, upon which you had a consultation and made some reply. I will ask you if that telegram, Exhibit "D," is not the one referred to by you.

A. My recollection is there was at least one other telegram. This one I remember also.

Q. Do you mean any telegram other than those in evidence as exhibits?

A. My recollection is that there was another telegram different from that at another time.

Q. Do you know where that telegram is?

A. No, sir.

670 Q. Can you fix the date of it in any way?

A. No, sir; I cannot; but think it was some time prior to this one.

Q. I understand you that this telegram of Mr. Stickney to Goudy, dated the 29th day of August, 1881, was the one you referred to as being the reply to that telegram?

A. This reply I saw before it was sent, and I remember the condition.

Q. That is the reply to which you refer in your direct examination as the reply made upon consultation as to the extension of time?

A. That is one of them.

Q. Was there any other?

A. I said that Mr. Stickney had consulted with me several times in regard to extensions for Mr. Goudy. This was a reply sent after one of these consultations.

Q. Do you know of any other dispatches sent to Mr. Goudy by Mr. Stickney or by yourself in reference to this matter except those already placed in evidence?

A. None sent by me or by Mr. Stickney, to my knowledge, only as Mr. Stickney represented to me.

Q. Do you know of any such telegrams now in existence?

—. I do not, sir.

Redirect examination—questions by Mr. COLE:

Q. Did Mr. De Koven, before he delivered over this stock put up in escrow, as he claims to have done, to the North Chicago City R'y Co., ever notify A. B. Stickney & Co. that it was claimed there was a default, and that he was required to deliver all property over and was about to do so?

A. I never knew of any notice.

Q. Did you ever see Mr. De Koven and have any conversation with him on the subject?

671 A. I met Mr. De Koven after delivery of the stock to Mr. Goudy or some one else.

Q. Did you have any conversation with him on the subject?

A. He attempted to explain to me that he did not know that I was a party to the contract, and I told him that I didn't care to hear his explanation, for a man who occupied the business position that he did and a man of his business experience must have known that it was his duty to notify the *cestui que trust*.

Q. Did he claim to have notified them?

A. He seemed to be very sorry that he had made a mistake.

Q. Did he make any claim that he had delivered any notice?

A. No, sir; he did not.

Witness excused.

JAS. J. HILL.

672 COMPLAINANT'S EXHIBIT "A."

The Northwestern Telegraph Co.

Dated Chicago, 21st July, 1880.
Received 21st July, St. Paul.

To A. B. Stickney:

May we consent to connection of Evanston & Pacific tracks and company use of tracks on Hawthorne avenue; just what we want.

GEORGE CHANDLER.

ST. PAUL, *July* 22, 1880.

Geo. Chandler, care Goudy & Chandler, lawyers, Chicago, Ills.:

Do not quite understand your message, but you are authorized to exercise your own judgment.

A. B. STICKNEY.

COMPLAINANT'S EXHIBIT "B."

W. C. Goudy. Geo. Chandler. W. S. Coman.

Law office, 162 Washington street.

CHICAGO, *Jan.*, 1881.

Mr. A. B. Stickney.

DEAR SIR: Yours 26th ult. is received. I expect to get right of way by first of March and have had no unexpected obstacles.

Yours truly, W. C. GOUDY.

673 COMPLAINANT'S EXHIBIT "C."

Superior Court, Cook County.

CHICAGO, *May* 2, 1881.

Mr. E. S. Stickney:

Mr. Jackson, of Janesville, and Mr. Barnes, of Chicago, representing the Chicago, Portage & Superior R. R. Co., have applied to me to get right of way into the city over the Evanston line within the limits.

I endeavored to get such information as I could as to their enterprise, and said I would receive any proposition they chose to make and consult with other parties interested. They made no definite proposition, but I learned they were prepared to make substantially the same arrangement entered into with you. If that could not be done they would like a lease or license to run over the line. Their scheme is the one having a grant up at Lake Superior and claiming some graded track, about which you and I talked. They have recently made some reorganization and seemed not to be willing to sell out. We parted with the understanding that I would consult with my parties and in a week let them know whether any proposition such as they desire will be entertained. I concealed the fact that any such arrangement as you made exists. You have all the facts. What shall I answer?

The whole matter is in your hands. My main object was to get you into communication with them as to any rights they have for a line northwesterly. I will be glad to have a reply this week.

We are getting along quite well with right of way, and expect to complete the most important matters this week.

Yours, W. C. GOUDY.

674 COMPLAINANT'S EXHIBIT "D."

The Western Union Telegraph Company.

Dated Chicago, —— 27, 1881.
Received at St. Paul, Minn., Aug. 27.

To A. B. Stickney:

Some proceedings pending to be tried within twenty days, and think no work should be commenced before that time.

W. C. GOUDY.

EXHIBIT (COMPLAINANT'S) "E."

Copy.

St. Paul, Minneapolis and Manitoba Railway Company, ass't general manager's office.

ST. PAUL, MINN., *Aug.* 27, 1881.

Telegram to W. C. Goudy, 162 Washington street, Chicago, Ill.:

Have you got the right-of-way matter all settled so I can go to work on construction at once? Answer.

(Signed) A. B. STICKNEY.

ST. PAUL, MINN., *Aug. 29th*, 1881.

Telegram to W. C. Goudy, 162 Washington street, Chicago, Illinois:

No objection to your taking more time to secure right of way, but in that case you must not expect us to commence work until next spring.

(Sig.) A. B. STICKNEY.

675 COMPLAINANT'S EXHIBIT "F."

Lake Side Cottages, D. W. Fowler, manager.

HARTLAND P. O., WIS., *Sept.* 1, 1881.

Mr. E. S. Stickney.

DEAR SIR: On receipt of your last dispatch I was about to answer that I had the time for completion fixed in the grants of right of way July 1, 1882, but that I thought the track in the city ought to be relaid this fall, so that if there was delay by injunction the entire work would not be postponed beyond July next.

Before answering, however, I received a proposition from Milwaukee and St. Paul desiring to make a contract whereby that Co. could use our right from the junction with them on Hawthorne avenue to Southport Ave. on some equitable basis.

Their purpose is to run on northwesterly to Deering's reaper factory, on Northwestern, at Fullerton Ave.

I inclose a plat which will give you the location, etc.

Now, I suggest that there can be no objection to a joint ownership or use of that much more of the track, and this will furnish a chance to have the track laid in the city this fall without requiring any attention from you. The St. Paul proposes, of course, to build what they want to use, and we could make the arrangements they should lay at the same time the track on Southport Ave. to the city limits. This will be in the line of what we want.

The question is one of terms. What do you say?

As to the joint additional track, that can be put under the same conditions as the joint track south, or we can charge carage
676 or in some other way. In any event I told them we should reserve the same right we have now to allow the cars of any

other company to run over, etc., merely giving them the right to use, etc.

They propose to get our ordinance and right of way from Southport to Deering's themselves.

Please give me an immediate answer and say what terms, etc., you think are proper.

They wanted an answer by Saturday, but I said it could not be given before the middle of next week.

Yours truly, W. C. GOUDY.

COMPLAINANT'S EXHIBIT "G."

W. C. Goudy. Geo. Chandler.

Office of Goudy & Chandler, 162 Washington Street.

CHICAGO, *Sept.* 14, 1881.

Mr. E. S. Stickney.

DEAR SIR: I wrote you 1st inst. to St. Paul to this effect: That the time fixed in the deeds for the completion of the road was July 1st, 1882, and that it would be sufficient to construct road out of the city next spring, but that, in my opinion, the work within the city ought to be done before winter so as to meet any delay that might be caused by an injunction. I further wrote that Mr. Atkins, sup't of C., M. & St. P., had applied for the right of — to use the line from their junction on Hawthorne avenue to Southport avenue, a distance of about 1,500 feet, and wished to know upon what terms it could be obtained.

677 I think the arrangement suggested is what you would like. The St. P. Co. wishes to run on from Southport Ave. northwest to Deering's reaper factory, at Fullerton avenue, on the Northwestern. I see no objection to having a joint ownership for 1,500 feet more, the same as the track south of the junction. If that is not deemed desirable by you they will pay carage.

There are certain things we should ask as conditions: 1st. The track should be laid on Southport to the limits at the same time as on Hawthorne, and we might contract with them to do the whole work at once. 2nd. They own exclusively the depot and ground at the south end, and we want depot privileges there.

Having these things in view, the questions are, 1st, will you consent to their use of the additional track; and, 2nd, if so, on what terms?

If you do not wish to do any work this fall the proposed arrangement will enable us to get track in the city down before winter, and you can go on with it in the spring.

I promised an answer before this, but your failure to get my letter of the 1st has so far prevented my giving it.

I told Mr. Atkins we should reserve any right we now had to allow any other company or cars to use the track.

Yours respectfully, W. C. GOUDY.

P. S.—If possible, answer by wire.

678 COMPLAINANT'S EXHIBIT "H."

Half-Rate Message.

The Western Union Company.

Dated CHICAGO, ILL., *May* 4, 1881.

To A. B. Stickney, vice-pres't Minneapolis & St. Louis R. R. Co., Minneapolis, Minn.:

Goudy says contract expired; not now in condition to renew; may be soon, but new contract on different terms must be made.

THOS. LOWRY.

679 COMPLAINANT'S EXHIBIT "I."

CHICAGO, *August* 18, 1882.

To A. B. Stickney, St. Paul, Minnesota:

A notice having been given that a meeting of the stockholders of the Chicago and Evanston Railroad Company would be held on Saturday, August 26, 1882, at room 44, No. 162 Washington street, in the city of Chicago, for the purpose of submitting to a vote of the stockholders a proposition of increasing the capital stock of said corporation, said notice is now withdrawn and notice given that such meeting will not be held for the want of a service of the notice on all of the stockholders, as required by law, and for other irregularities in calling said meeting.

GEO. CHANDLER,
WILLIAM C. GOUDY,
VALINTINE C. TURNER,
SAMUEL B. CHASE,
JOHN W. ELA, *Directors.*

CHICAGO, ILLINOIS, *Sept. 4th*, 1882.

A. B. Stickney, Esq.

SIR: You are hereby notified that at a meeting of the board of directors of the Chicago & Evanston Railroad Company held this day the following preamble and orders were adopted by said board:

"Whereas this company is indebted for money borrowed
680 by it, and judgments have been rendered for right of way which are not paid, and it is liable and will become liable for the payment of other sums for right of way, and funds — necessary for the construction of the road: Therefore

It is ordered that a call be made for the payment of the capital stock in full, to be paid at the office of the company, in Chicago, the 15th day of September, 1882.

It is further ordered that notice of such call be given, as provided in the by-laws, to each person holding or claiming to hold stock or certificates entitling him to stock.

It is further ordered that the treasurer be authorized to receive and collect the said assessment.

It is further ordered that the secretary be appointed as treasurer *pro tem.*"

Respectfully yours,

GEORGE CHANDLER, *Secretary.*

681 COMPLAINANT'S EXHIBIT "K."

Articles of agreement made and entered into on this nineteenth day of August, 1882, by and between A. B. Stickney, of the city of St. Paul, in the State of Minnesota, of the first part, and James J. Hill, of the same place, party of the second part.

In consideration of the sum of fifteen hundred dollars to him in hand paid by the said James J. Hill, the receipt of which is hereby acknowledged, the said A. B. Stickney has bargained, sold, assigned, transferred, and set over unto said James J. Hill, and by these presents does sell, bargain, assign, transfer, and set over unto said Hill, all the right, title, and interest of said A. B. Stickney in and to and under and by virtue of a certain contract and agreement in writing made and entered into on the 28th day of May, one thousand eight hundred and eighty, by and between William C. Goudy, of the city of Chicago and State of Illinois, party of the first part, and A. B. Stickney & Co., parties of the second part, and hereby authorizes and empowers the said James J. Hill, in the name of A. B. Stickney or A. B. Stickney & Co., but at his own proper cost and expense, to sue for and recover and hold and enjoy to his own use and benefit all damages, claims, or demands, whether legal or equitable, arising out of said contract, and to bring suit in equity to enforce a specific performance of said contract, and to recover and hold all stock, money, notes, and other property, real, personal, or mixed, which he may recover, *or* by virtue of said contract, to his sole use and benefit and that of his heirs, executors, administrators, and assigns forever.

And in consideration of the premises the said James J. Hill, party of the second part, does hereby covenant and agree to and
682 with said A. B. Stickney that he, the said Hill, will assume all liabilities growing out of said contract with said Goudy, and will perform in the manner specified in the said contract all the things therein specified by said A. B. Stickney & Co. to be performed, remaining to be performed, and will save said A. B. Stickney harmless from any loss, damage, or liability arising or accruing or to arise or accrue from said contract or by reason of the same, and will prosecute all suits to obtain redress for the non-performance of said contract by said Goudy or those whom he represented in making said contract and all actions for specific performance of said contract at his, the said Hill's, own proper cost and expense, and will save the said Stickney harmless from all and every cost, damage, or expense which has or may grow out of said contract.

Witness our hands and seals this 19th day of August, 1882.

A. B. STICKNEY. [SEAL.]
JAMES J. HILL. [SEAL.]

Signed, sealed, and delivered in the presence of—
WM. ELLY BRAMHALL.

683 COMPLAINANT'S EXHIBIT "L."

A. B. Stickney's residence, 31 Smith street.

ST. PAUL, MINN., *Feb.* 4, '82.

J. J. Hill, Esq.

DEAR SIR: The Chicago & Evanston R. R. Co. owns, 1st, an undivided half of the right of way of all the Chicago & Pacific Div. of the Chicago, Milwaukee and St. Paul R'y inside the city limits of Chicago.

2nd. It owns, in addition to the above, the entire right of way from a junction with the above road near Jones avenue north about 1½ miles to northern limits of the city.

3rd. It owns the right of way north of the city limits to south line of Evanston, about 8 miles.

4th. It owns an undivided half of the completed portion of the C. & P. Div. of the C., M. & St. P. R'y in the city of Chicago, from its terminus near Chicago avenue north about 1 and ½ miles to Jones avenue.

There are 1,200 shares of stock outstanding, of which we own absolutely 250 shares.

We have in addition 875 shares deposited in trust, to be delivered to us and to become our absolute property on completion of our contract and on the payment of $55,000. Our contract requires us to build said road during the coming summer to south line of Calvary *county*, a distance of about seven miles. When this is completed and the $55,000 purchase-money paid we shall be absolute owners of 1,125 shares out of 1,200 shares of its capital stock.

Very truly yours, A. B. STICKNEY.

684 COMPLAINANT'S EXHIBIT "M."

Personal & confidential.

FEB. 6TH, '2.

S. S. Merrill, Esq., Milwaukee.

DEAR SIR: I have got from A. B. Stickney a memorandum of what is covered by his contract with the Chicago & Evanston R. R. Co. as follows:

1st. An undivided half of the right of way of all the Chicago & Pacific Div. of the Mil. & St. Paul R'y within the limits of the city of Chicago.

2nd. The entire right of way from a junction with the above road near Jones avenue north about 1 and ½ miles to the city limits on the north side of the city and, say, 1 and ½ miles of iron rails.

3rd. The right of way north of the city limits to the south line of Evanston, about 8 miles.

4th. The undivided half of the completed line of the Chicago Pac. Div. in the city of Chicago, from its terminus near Chicago avenue north about 1 and ½ miles to Jones avenue.

There are 1,200 shares of the stock of the Chic. & Evanston outstanding, of which he has ownership of 250 shares and 875 shares in trustees' hands, to be delivered and become absolute property on the completion of contract, which is to pay a certain sum of money and build about 7 miles of track, the track to be built the coming summer.

If anything is done it should be done early. The party has been to see me twice about taking it. Ans.

Yours very truly, JAS. J. HILL.

685 COMPLAINANT'S EXHIBIT "N."

Chicago, Milwaukee & St. Paul Railway.

GENERAL MANAGER'S OFFICE,
MILWAUKEE, *Feb. 15th*, 1882.

J. J. Hill, Esq., St. Paul, Minn.

MY DEAR SIR: Referring to your letter of the 6th inst. and our conversation in regard to the Chicago & Evanston matter, I have had a conference with Mr. Mitchell in regard to it, and, although he thinks it a valuable franchise, he is not quite sure that our company at this time would care to purchase it.

Truly y'rs, S. S. MERRILL.

686 COMPLAINANT'S EXHIBIT "O."

Chicago & Evanston Railroad Company.

No. 33. Shares, one hundred dollars. 110⅔ shares.

CHICAGO, *September 30th*, 1881.

This certifies that A. B. Stickney is entitled to one hundred and two-thirds shares of the capital stock in the Chicago & Evanston Railroad Company, on which there has been paid the sum of (No.) dollars on each share. Said shares are transferable on the books of said company by A. B. Stickney or his attorney on the surrender of this certificate, provided all instalments due thereon shall have been paid.

WILLIAM C. GOUDY, *President.*

GEORGE CHANDLER, *Secretary.*

Know all men by these presents that —, —— ——, for value received, ha- bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer, unto —— —— — shares of the capital stock of the Chicago and Evanston Railroad Company standing in — name on the books of said company and transferable only at its office in Chicago, Illinois, and do hereby constitute and appoint —— —— — true and lawful attorney irrevocably for and in — name and stead, but for — use, to sell, assign, transfer, and set over all or any part of said shares, and for that purpose to make and execute all necessary acts of assignment and

transfer and one or more persons to substitute, with like full power, hereby ratifying and confirming all that — said attorney or substitutes shall lawfully do by virtue hereof.

In witness whereof — ha- hereunto set — hand and seal the — day of ——, one thousand eight hundred and —.

A. B. STICKNEY. [L. S.]

Sealed and delivered in presence of—

WM. ELY BRAMHALL.

687 COMPLAINANT'S EXHIBIT "P."

MAY 29, '2.

Hon. W. C. Goudy, Chicago, Ill.

DEAR SIR: I am in receipt of letters and telegrams from Mr. Lowry saying that you claim that I have forfeited my rights in the Chicago & Evanston R'y.

I am very much surprised at the information, as the delay has been entirely at your request, both verbal and written. Your letters and telegrams I have.

I think I am entitled to some explanation. I would like to hear from you.

Very truly yours, A. B. STICKNEY.

688 I, Wm. A. Spencer, special examiner, as mentioned in the annexed certified copy of an order, do hereby certify that I was attended by the parties, by their solicitors, at the time and place as stated in the caption and foregoing depositions and by the said witnesses therein named, and that the said witnesses, being of sound mind and lawful age, were each, before the commencement of the taking of his deposition, by me duly and publicly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, and that the deposition of each as given was reduced to writing by a stenographer, with the consent of the solicitor for the respective parties, in presence of such witness and the said solicitors and from the statement of the witness, and that the deposition of each witness, where completed, was carefully read over by each witness and subscribed by such witness in my presence.

And I further certify that the exhibits attached to these depositions are the ones referred to therein, and that in the caption and said depositions is contained a complete record of all the proceedings before me at the time of the taking of the same.

In testimony whereof I have hereunto set my hand this 3rd day of November, 1884.

WM. A. SPENCER,
Special Examiner.

Fees:

2 days' attendance	$6 00
Oaths to 2 witnesses	20
168 folios testimony	33 60
15 exhibits certified	3 75
	$43 55

(Endorsed:) Filed May 20, 1885. Wm. H. Bradley, clerk.

689 *By-Laws.*

ARTICLE I.—*Meetings of Stockholders.*

SECTION 1. The next annual meeting of the stockholders for the election of directors shall be held on the 26th day of August, A. D. 1865, at the hour of ten o'clock a. m., at such place as may be designated by Voluntine C. Turner, the president of the board of directors, in a notice to be published in one of the daily papers printed in the city of Chicago, county of Cook and State of Illinois, at least ten days before said 26th day of August, 1865, and that shall be sufficient notice to the stockholders of such meeting.

SECTION 2. The annual meetings for the election of directors after the said meeting on the 26th day of August, 1865, shall be held on the second Monday of January, A. D. 1867, and every year thereafter on the same day of the month, at the hour of ten o'clock a. m., at such place as may be designated by the president of the board of directors in a notice to be published in one of the daily papers printed in said city of Chicago at least ten days before such meeting, and that shall be sufficient notice to the stockholders of such meetings.

690 SECTION 3. Meetings of the stockholders for the election of directors or the transaction of any of the business of the corporation may be called at any time by the stockholders owning a majority of the capital stock to assemble at such time and place in the city of Chicago as may be designated by such stockholders. Notice of such meetings shall be in writing or printed and delivered to each stockholder or left at his usual place of business or residence or deposited in the post office in Chicago, addressed to such stockholder at Chicago. Said notice must state whether the meeting is called for general or special purposes. If for general purposes, then it shall be lawful for the meeting to transact any business of the company, and if for special purposes, then no business other than that specified in the notice shall be acted upon at such meeting. Any meeting held in pursuance of this section shall not be held invalid or irregular for the want of notice to any person not shown to be the owner of stock by the books of the company.

SECTION 4. Each stockholder may vote in person or by proxy, and shall be allowed to cast as many votes as he owns shares. At all elections for directors a plurality shall determine the result.

ARTICLE II.—*Meetings of Directors.*

691 SECTION 1. The board of directors shall meet on the call of the president at such time and place, in the city of Chicago, county of Cook and State of Illinois, as he may designate. Notice of the meetings shall be given by delivering a written or printed notice to each of the directors or by leaving the same at his usual place of business or residence or addressing the same to him through the post office in Chicago, addressed to him at Chicago. Vacancies may be filled in the board by the remaining directors. A majority shall constitute a quorum.

ARTICLE III.—*Officers.*

SECTION 1. The officers of the company shall be a president, vice-president, secretary, and treasurer, and shall be elected by the board of directors. Vacancies may be filled by the directors at any meeting thereof.

SECTION 2. The president shall be the chief executive officer, shall preside at the meetings of the board of directors, and under the direction of the board of directors shall have the general supervision of the affairs of the company.

SECTION 3. The vice-president shall, in case of the absence or disability of the president, discharge the duties of the president.

692 SECTION 4. The secretary shall keep a record of the proceedings of the board of directors. He shall keep a register of the stockholders of the company, with the name, residence, and amount of capital stock owned by each, and shall enter therein all certificates issued and all transfers of stock. He shall keep the seal of the company and affix the same with his name to all official documents signed by the president.

SECTION 5. The treasurer shall keep all moneys of the company, with a book showing from whom received, to whom paid, and on what account the same was so received or paid. No money shall be paid except on the written order of the president and secretary. The treasurer shall give bond in a sum fixed by the directors, and with security to be approved by them, conditioned for the faithful discharge of his duties as treasurer.

ARTICLE IV.—*Certificates of Stock and Assessments.*

SECTION 1. No certificate of stock shall be good or binding on the company until properly signed by the president and secretary and has the seal of the company affixed and the same has been registered by the secretary.

SECTION 2. It shall be sufficient notice of an assessment on the capital stock heretofore or hereafter to be made to make a personal

693 demand therefor on the owner or holder or to make a demand in writing, addressed to the owner or holder, and leave the same at the usual place of business or residence of such person or to deposit such demand in the post office at Chicago, addressed to such owner or holder at Chicago; and, if such assessment or any part

thereof remains unpaid for ten days after such demand, it shall be lawful for the board of directors to forfeit the stock of such delinquent stockholder, according to the provisions of the subscriptions to the company.

ARTICLE V.—*Amendments.*

SECTION 1. These by-laws may be altered, repealed, or amended at any meeting of the board of directors or the stockholders by a majority vote.

SECTION 2. All by-laws heretofore passed are hereby repealed and annulled, and all orders or resolutions heretofore adopted are vacated and annulled so far as the same are inconsistent with these by-laws.

STATE OF ILLINOIS, } ss:
County of Cook, }

I, T. W. Wadsworth, do hereby certify that I am secretary of said Chicago and Evanston Railroad Company and keeper of the
694 records and seal thereof, and that the annexed and foregoing is a true and correct copy of the by-laws of said company adopted at a meeting of the board of directors of said company on the 25th day of March, A. D. 1865, as appears by the records of said company, and that the same remained in full force without change or amendment until January 10th, A. D. 1883.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said company this 24th day of February, A. D. 1885.

T. W. WADSWORTH, *Sec'y.*

Endorsed: Filed May 21, 1885. W. H. Bradley, cl'k.

695 Afterwards, to wit, on the eighteenth day of August, 1887, came A. B. Stickney and filed in said clerk's office his affidavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

Affidavit of A. B. Stickney.

In the United States Circuit Court for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } Bill.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

A. B. STICKNEY, being duly sworn, says that he knows the value of the certificates of stock of the Chicago and Evanston Railroad

Company the ownership and possession of which were the matters in controversy in the above-entitled cause, and that the value of the same exceeds and ever since the commencement of said suit has exceeded the sum of five thousand dollars, exclusive of the costs of said suit.

A. B. STICKNEY.

Subscribed and sworn to before me this 26 day of July, A. D. 1887.

[SEAL.] WM. ELY BRAMHALL,
Notary Public, Ramsey Co., Minn.

Endorsed: Filed Aug. 18, 1887. Wm. H. Bradley, clerk.

696 On the same day, to wit, on the eighteenth day of August, 1887, came James J. Hill and filed in said clerk's office his affadavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

Affidavit of James J. Hill.

In the United States Circuit Court for the Northern District of Illinois.

JAMES J. HILL
vs.
THE CHICAGO AND EVANSTON RAILROAD COMPANY *et al.* } Bill.

STATE OF MINNESOTA, }
County of —, } *ss:*

JAMES J. HILL, being duly sworn, says that he is the complainant in the above-entitled cause; that he knows the value of the certificates of stock of the Chicago and Evanston Railroad Company the ownership and possession of which were the matters in controversy in said cause, and that the value of the same exceeds and ever since the commencement of said suit has exceeded the sum of five thousand dollars, exclusive of the costs of said suit.

JAS. J. HILL.

Subscribed and sworn to before me this 11th day of August, A. D. 1887.

[SEAL.] E. T. STEVENSON,
Notary Public, Ramsey Co., Minnesota.

Endorsed: Filed Aug. 18, 1887. Wm. H. Bradley, clerk.

697 On the same day, to wit, on the eighteenth day of August, 1887, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Circuit Court of the United States in and for the Northern District of Illinois.

Know all men by these presents that we, James J. Hill and W. P. Clough and E. Sawyer, are held and firmly bound unto the Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnston, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Millbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith in the full and just sum of five hundred dollars ($500.00) to be paid to the said The Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven,
698 George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnston, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Millbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of July, in the year of our Lord one thousand eight hundred and eighty-seven.

Whereas lately, at the July, 1887, term of the United States circuit court for the northern district of Illinois, in a suit depending in said court, wherein said James J. Hill was complainant and The Chicago and Evanston Railroad Company and the other above-named obligees of this bond were defendants, a decree was rendered from which the said James J. Hill has taken an appeal to the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said James J. Hill shall prosecute his appeal with effect and answer all costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue

JAS. J. HILL. [SEAL.]
W. P. CLOUGH. [SEAL.]
EWD. SAWYER. [SEAL.]

In the presence of—

E. T. STEVENSON.
W. I. KENNA.

699 STATE OF MINNESOTA, } ss:
County of Ramsey, }

I, E. T. Stevenson, a notary public in and for the said county, in the State aforesaid, do hereby certify that James J. Hill, W. P. Clough, and Edward Sawyer, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this eleventh day of August, A. D. 1887.

E. T. STEVENSON,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

JAMES J. HILL, W. P. CLOUGH, and EDWARD SAWYER, being — first duly sworn, on his oath says that he is one of the sureties named in the foregoing bond; that he is worth the sum of one thousand dollars above his debts and liabilities and exclusive of his property which is exempt from execution.

JAS. J. HILL.
W. P. CLOUGH.
EWD. SAWYER.

700 Subscribed & sworn to before me this 11th day of August, 1887.

E. T. STEVENSON,
[SEAL.] *Notary Public, Ramsey Co., Minn.*

Approved.
W. Q. GRESHAM.

Endorsed: Filed Aug. 18, 1887. Wm. H. Bradley, clerk.

701 NORTHERN DISTRICT OF ILLINOIS, ss:

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein James J. Hill is the complainant and The Chicago and Evanstown Railroad Company, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U.S., Northern Dist. Illinois, 1855.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this fifteenth day of September, 1887.

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 246. James J. Hill, appellant, *vs.* The Chicago & Evanston Railroad Company, The Chicago, Milwaukee & St. Paul Railway Company, The North Chicago City Railway Company, *et al.* Filed October 17, 1887.

Office Supreme Court U. S.
FILED,
DEC 17 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JAMES J. HILL,

Appellant,

vs.

THE CHICAGO & EVANSTON RAILROAD COMPANY *et al.*,

Respondents.

Points and Authorities and Argument on Motion to Dismiss.

GORDON E. COLE,

Solicitor and of Counsel for Appellant.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

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Points and Authorities and Argument on Motion to Dismiss.

GORDON E. COLE,

Solicitor and of Counsel for Appellant.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

JAMES J. HILL,

Appellant,

vs.

CHICAGO & EVANSTON R. R. CO. *et al.*,

Respondents.

Appeal from the Northern District of Illinois.

APPELLANT'S ARGUMENT,

And Points and Authorities, on Motion to Dismiss Appeal.

The meager statement of the case in the motion papers very inadequately represents the real issues in the case, and entirely fails to show the intimate relations and common interest which all of the defendants sustain to the case and to each other, and to any final decree that might be rendered, in which the rights

of all the parties litigant should be adjusted, not only between the plaintiff and the defendants, but between the various defendants themselves.

The following is an abstract of the bill of complaint:

James J. Hill, of the city of St. Paul, in the state of Minnesota, complainant, brings this, his bill of complaint, against the Chicago & Evanston R. R. Co., a corporation duly incorporated under and by virtue of the laws of the state of Illinois; the Chicago, Milwaukee & St. Paul Ry. Co., a corporation incorporated under and by virtue of the laws of the state of Minnesota; the North Chicago City Ry. Co., a corporation incorporated under and by virtue of the laws of the state of Illinois; William C. Goudy, Volney C. Turner, John De Koven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham and John J. Johnson, of the city of Chicago, in the state of Illinois; J. C. Easton and S. S. Merrill.

The bill proceeds to allege that on and prior to the 28th day of May, 1880, the Chicago & Evanston R. R. Co. had a capital stock of one thousand shares, of which a controlling interest, to-wit, 875 shares, were in the possession and under the control of the defendant William C. Goudy, with authority to dispose of the same in any manner which he might deem expedient, but that the equitable interest in said shares was in the defendant the North Chicago City Ry. Co., for whom said Goudy held said shares in trust, but with full power of disposition, as aforesaid; that the defendant the North Chicago City Ry. Co., besides being the equitable owner of a majority of the stock of the defendant the Chicago & Evanston R. R. Co., was interested in and desirous of securing the

construction of the railway of the Chicago & Evanston R. R. Co., (giving a description of the line of road in controversy,) and to that end had theretofore advanced money to the Chicago & Evanston R. R. Co. defendant, for the purpose of aiding in said construction; to secure the repayment of which advances the the defendant the Chicago & Evanston R. R. Co. executed and delivered to the defendant the North Chicago City Ry. Co. its promissory note for the sum of $36,847.48, which note was placed in the hands and control of the defendant Goudy, who held the same on the same conditions and terms as said stock, and was clothed with full power of disposition and control thereof; that said note was of even date with the contract hereinafter mentioned, and was executed by the Chicago & Evanston R. R. Co. and deposited with the defendant Goudy, with the assent of the defendant the North Chicago City Ry. Co., for the purpose of enabling him to perform all conditions of said contracts as hereinafter set out, and as a part of the same transaction.

That the complainant and one, A. B Stickney, were desirous of constructing said railroad of the defendant the Chicago & Evanston Railroad Co. and obtaining the control of said corporation and the ownership of the majority of the stock in said corporation, and to that end an the 28th day of May, 1880, entered into negotiations with the defendant Goudy and the Chicago & Evanston R. R. Co. with the knowledge, and concurrence of the defendant the North Chicago City Ry. Co., which negotiations resulted in a series of agreements and contracts all bearing even date and all parts of the same transaction, to-wit, the complainant and said Stickney, under the style of "A. B.

Stickney & Co." made and entered into an agreement in writing with the defendant the Chicago & Evanston R. R. Co. whereby they promised and agreed to and with said defendant to furnish all material except such iron as the said defendant then owned, and to construct and complete in a good and substantial manner so that cars might be used thereon, a single track railroad for said defendant, on the right of way then owned by said defendant, or that should thereafter be obtained by defendant, (according to a contract bearing even date therewith, entered into between said defendant and the defendant Goudy,) which agreement is hereinafter set out, at its own cost and expense, (here follows a description of the road), within four months after the first day of March one thousand eight hundred and eighty-one.

The bill further proceeds to set out said contract *in extenso;* but the only other clause which is material here as alleged in the bill, is the following:

"And it was further provided in and by said contract that the contract at that time entered into between said defendant and defendant Goudy, by authority of its board of directors, in regard to procuring the right of way for said company was made with said Stickney & Co's express consent, and the defendant the Chicago & Evanston R. R. Co. thereby agreed not to alter, change or annul said contract or release said Goudy from any of the provisions thereof, without the consent of said Stickney & Co. during the continuance of said contract between said Stickney and the defendant the Chicago & Evanston R. R. Co. If the party of the second part (the Chicago & Evanston R. R. Co.) shall fail to perform any of its agreements the party of the first part may discontinue perform-

ance unless said company shall obtain new right of way, and the company shall pay Stickney & Co. for labor and materials already furnished and all damages suffered by them, and Stickney & Co. shall have a lien on all the property and franchises of the company therefor; which contract is attached to the bill and marked "Exhibit B." That on the same day and as a part of the same transaction the defendant Goudy entered into a contract and agreement with the defendant the Chicago & Evanston R. R. Co., with the knowledge, assent and concurrence of said A. B. Stickney & Co., being the agreement "Exhibit B".

The material allegations in regard to such contract set up in the bill are as follows:

First. Said Goudy contracted that he would procure an adjustment of actions growing out of the contract between the Chicago & Evanston R. R. Co., and the Chicago & Pacific R. R. Co., in regard to the construction of certain tracks therein named, and if any sum should be found due from the defendant the Chicago & Evanston R. R. Co., said Goudy would pay the same; that he would procure, or cause to be procured and vested in said company the right of way for the line of railroad in controversy, upon such feasible and practicable lien as the defendant the Chicago & Evanston R. R. Co. might select, by the first day of March, 1881; that all damages, costs and consideration necessary to be paid in the procurement of said right of way should be paid by said defendant Goudy, who also agreed in and by said contract to perform, or at his own expense to procure the performance of all legal services to be performed in the procurement of said right of way; that said right of way over private property should be free from incum-

brance; which agreement was attached to the complaint and marked "Exhibit A."

The bill proceeds to allege that on the same day, and as a part of the same transaction and for the purpose of fully carrying into effect the intentions of the contracting parties with the knowledge, etc., of the defendant, the North Chicago City Ry. Co. and the Chicago & Evanston R. R. Co., and the directors and officers thereof, and the defendant John DeKoven, the said A. B. Stickney & Co. entered into an agreement in writing with the defendant Goudy, in and by which the defendant Goudy, among other things, for the consideration, etc., promised and agreed to and with Stickney & Co. that he would perform the agreement on his part contained in the contract between himself and the Chicago & Evanston R. R. Co., "Exhibit A;" that he should, at the time of the execution of the said contract, cause to be properly assigned to the defendant John DeKoven, as a trustee, eight hundred and seventy-five shares of the capital stock of the Chicago & Evanston R. R. Co., to be held by him in trust for the purposes thereinafter specified; that he would also at the same time cause to be properly assigned to said John DeKoven as said trustee, the note hereinbefore referred to, made by the Chicago & Evanston R. R. Co. to the North Chicago City Ry. Co., to be held by him in trust for the purposes thereinafter specified; also that he would at the same time cause to be properly assigned to said John DeKoven as trustee all his claim and rights to the sum of twenty-five thousand ($25,000) dollars, which was the sum agreed to be paid him by the Chicago & Evanston R. R. Co. for his services and expenditures in obtaining the right of way as aforesaid, in agreement "Exhibit A;" that he

would guarantee to keep and save harmless the Chicago & Evanston R. R. Co. of and from all debts of said company then existing or which might be contracted by said company before the control should be transferred to said Stickney & Co., except said promissory note and the indebtedness growing out of the contract, "Exhibit A," and except any other indebtedness created by the agency and authority of Stickney & Co.

Said Stickney & Co. therein agreed with said Goudy to pay him the sum of fifty-five thousand ($55,000) dollars in installments, viz., on the signing of said contracts the sum of twenty thousand ($20,000) dollars, ten days after said Goudy should have performed all the agreements on his part contained in "Exhibit A" the further sum of fifteen thousand ($15,000) dollars, and sixty days after the last payment should have become due the further sum of twenty thousand ($20,000) dollars.

It was further mutually agreed in said contract that 875 shares of stock so transferred to said DeKoven as trustee, as aforesaid, and the said promissory note of the Chicago & Evanston R. R. Co. and the said sum of twenty-five ($25,000) dollars, which should become due to said Goudy under said contract "Exhibit A," should be held by said DeKoven in trust until either said Goudy or said Stickney & Co. should be entitled to the delivery of the same according to the terms of said agreement; that said Stickney & Co. should make the deferred payments, to-wit, the said fifteen thousand ($15,000) dollars and twenty thousand ($20,000) dollars to the said DeKoven in trust for said Goudy. That if said Stickney & Co. should fail or neglect to make either of said payments, said Goudy might de-

clare the contract ended, all rights forfeited and all money paid under it might be kept by said Goudy as liquidated damages; that the said DeKoven should assign and transfer the shares of stock, etc., held by him to said Goudy; that if said Stickney & Co. should make payments at the times and in the manner specified, DeKoven should assign and transfer to said Stickney & Co. said shares of stock, etc., and the full control of the board of directors and the officers of said company should be given to said Stickney & Co.; that if default should be made by Goudy in the performance of any of his agreements, so that the deferred payments of fifteen thousand ($15,000) dollars and twenty thousand ($20,000) dollars should not become due, and said default should continue for three months after the first day of March, 1881, then upon payment by said Stickney & Co. of the sum of twenty-five thousand ($25,000) dollars to said John DeKoven for the use of Goudy in lieu of said deferred payments of fifteen thousand ($15,000) dollars and twenty thousand ($20,000) dollars, DeKoven should assign said stock, etc., to Stickney & Co., and Stickney & Co. should be entitled to recover from Goudy such damages as they might sustain by reason of said default, in a sum not exceeding thirty thousand dollars. But in case said Stickney should neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said DeKoven should transfer said stock, etc , to Goudy, which contract was marked "Exhibit C."

The bill further alleges that defendant DeKoven duly accepted said trust; that the defendant Goudy duly caused to be assigned and transferred to DeKoven said

shares, etc., to be held by DeKoven in trust, and delivered to Stickney & Co. on performance of the terms of the contract. That at the time of signing these contracts Stickney & Co. paid to Goudy the sum of twenty thousand ($20,000) dollars pursuant to said contract "Exhibit C"; that Goudy never did perform and complete his agreements, and never gave Stickney & Co. any notice as provided in the contract. That Stickney & Co. never failed or neglected to make any or either of the payments specified in said contract; that the same never became due and payable; that no default has occurred or been made by the said Goudy, in the performance of the agreements by him to be performed in and by "Exhibit C," so as to give Stickney & Co. the right to make the alternative payment of twenty-five ($25,000) thousand dollars as provided in said contract. That after said contract was executed, defendant Goudy from time to time applied to Stickney & Co., with the knowledge and consent of the defendant the Chicago & Evanston R. R. Co. and said DeKoven and said North Chicago City Ry. Co., for further time in which to perform his said agreements, and obtain said right of way, and represented that no interest would suffer by delaying the obtaining of said right of way until the spring of 1882. That Goudy represented all the interests involved, to wit, the Chicago & Evanston R. R. Co., the North Chicago City Ry. Co. and the said trustee.

That said Stickney & Co. thereupon assured said Goudy that unless the said right of way could be obtained within the time contemplated within said contract, they would be unable to construct said road before the spring of 1882, whereupon it was agreed and understood by and between said Goudy

and Stickney & Co. that the defendant Goudy might have more time than that mentioned in the contract. That Stickney & Co. should proceed in the spring of 1882 to construct said road as soon as the right of way should be procured. From time to time during the winter of 1881 and the spring and summer of 1882, the said Stickney & Co. applied to said Goudy to be informed as to how he was getting on in obtaining said right of way and when they could commence work, and were from time to time in response to said inquiries informed by said Goudy that he was progressing well, but a short delay would be necessary. That the time for the mutual performance of the covenants in said agreement contained was by mutual agreement waived and extended from time to time with the constant assurance from Goudy that he was proceeding in good faith to obtain said right of way, with the consent of the defendants DeKoven, Turner and the directors of said North Chicago City Ry. Co. and of the Chicago & Evanston R. R. Co.; that Stickney & Co. acquiesced in said delay under the expectation and belief induced by the conduct and assurance of Goudy, that but a short delay would occur before said right of way would be obtained, and that said Goudy was honestly proceeding to obtain the same.

That neither Goudy nor any of the defendants ever gave Stickney & Co. any notice or intimation that a default had occurred or would occur, or that they so claimed so as to set the time running within which, by the terms of said contract, said Stickney & Co. were to make the alternative payment of twenty-five thousand ($25,000) dollars therein specified, until a very short time before the filing of the bill, when the defendant Goudy called on Stickney & Co. at St. Paul,

and claimed for the first time that the time for the performance of the contract had expired, and that the defendant DeKoven, trustee, had delivered said stock, etc., to defendant Turner; that Stickney & Co. thereupon offered to pay said sum of twenty-five thousand ($25,000) dollars, and requested that said stock, etc , should be transferred to them, which Goudy declined to do or cause to be done.

That the complainant has lately learned that at that time defendants Goudy and Turner, the latter being one of the directors of the Chicago & Evanston R. R. Co., and largely interested in the North Chicago City Ry. Co. and president thereof, were in secret negotiations with the defendants Easton, Wadsworth, Walker, Hubbard and Merrill, for the sale and transfer to the last named defendants, who were acting for and in the interest of the defendant the Chicago, Milwaukee & St. Paul Ry. Co., of said shares, etc.; that about that time said Turner, Goudy and DeKoven caused to be transferred and delivered said shares, etc., to said last named defendants, representing said Chicago, Milwaukee & St. Paul Ry. Co.; that the board of directors of said Chicago & Evanston R. R. Co. was then, and at the time of the execution of said contracts, composed of defendan s Goudy, George Chandler, V. C. Turner, Samuel B. Chase, Ebenezer Buckingham, John W. Ela and Thomas Parker, Jr.; that Goudy was president, and Chandler, his partner in business, was secretary.

That Goudy, together with Stickney & Co., owned substantially all of the stock of said Chicago & Evanston R. R. Co., except said 875 shares; that the defendants Goudy, Chandler, Turner, Chase and Buckingham, as trustees of said Chicago & Evanston R. R.

Co., and then composing a majority of the directors thereof, together with defendants Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill, caused a pretended meeting of the stockholders of said last named company to be held without notice to the complainant or to said Stickney & Co., and without their knowledge, and at said pretended meeting of stockholders, in pursuance of a secret understanding and agreement, for the purpose of enabling defendants Wadsworth, Easton, Walker, Hubbard, Johnson and Merrill to have full control of the Chicago & Evanston R. R. Co., and a majority of its board of directors, defendants Goudy, Turner, Chase, Buckingham and Chandler resigned as directors of said company, and Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson were pretended to be elected directors of said company in place of said directors so resigning; and in such pretended election said 875 shares of said stock were represented and voted upon by said Easton, Walker, Wadsworth, Hubbard, Merrill and Johnson, and was substantially all the stock represented at said pretended meeting. That thereupon the said pretended directors, Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson, pretended to elect said defendant J. C. Easton president, and T. W. Wadsworth secretary and treasurer of said Chicago & Evanston R. R. Co.; said directors Ela and Parker having no notice or knowledge of such meeting or pretended election; and said pretended directors and officers are pretending and claiming to be the legal and actual directors and officers of said company, and have taken or are taking possession of the road-bed and property of said company, and are threatening to and about to complete, occupy, use and control the railroad of said

company, and hold, use and control its franchises and property.

That Stickney & Co. had no notice or knowledge of said meetings or any of them, or of said action on the part of said defendants or either of them in the pretended transfer of said shares of stock or said resignations of said old directors or said pretended election of said new directors, or of any action on the part of said pretended new directors until a few days prior to the filing of this bill.

That after Goudy called upon Stickney & Co. as aforesaid, the complainant repeatedly endeavored to obtain information as to the actions and intentions of said Goudy and said company, and whether they were intending to carry out their contracts, but was unable to do so; that he applied to John W. Ela and Thomas Parker, directors of said company for information as to the same, and as to said company and its affairs, and said Ela and Parker, as such directors applied to the said pretended new officers of said company for such information and were refused it, and were not permitted to examine the books or records of said companies.

That said Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson, had full notice and knowledge at the time of taking the transfer of said stock, etc., and the control of said Chicago & Evanston R. R. Co. and at the time of all their actions therein mentioned, of said three contracts between said Goudy, Stickney & Co. and the Chicago & Evanston R. R. Co., and of what had been done under the same, and of the rights of Stickney & Co. and the complainant thereunder; and that Stickney & Co. were not in default, and that said Goudy and Turner had no right to said stock;

that neither they nor the Chicago & Evanston R. R. Co. or said De Koven had any right to transfer said stock or the control of said company to any one but Stickney & Co. or the complainant.

The bill further charges that the defendants Goudy, Turner, Chandler, Chase, Buckingham and DeKoven conspired and confederated together to defraud the said Stickney & Co. and the complainant, and induced said Stickney & Co. to enter into said contract, (Exhibit "C,") and pay said sum of twenty thousand ($20,000) dollars to the defendant Goudy; and all the defendants herein did, well knowing the premises, and that defendant Goudy had made no *bona fide* efforts to obtain said right of way or perform said agreements, but had obtained a waiver of the time for the performance of said contract of said Stickney & Co. by fraudulent assurance that he was procuring and making efforts to obtain said right of way in good faith, cause said stock, etc., together with the control of the Chicago & Evanston R. R. Co. to be assigned, transferred and delivered by defendant De Koven in violation of the trust upon which he held the same, and in violation of and in fraud of the rights of Stickney & Co., to the defendant Turner, and by said Turner to said Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill. That the complainant verily believes and charges that Goudy never made any *bona fide* attempt to procure said right of way, but that his said representations were false and that the defendants, the pretended majority of the directors of the defendant, the Chicago & Evanston R. R. Co., refused to recognize Stickney & Co. or the complainant as the holders and owners of said stock or to permit the complainant to vote the same.

The bill further charges that Stickney & Co. were at and before the time of the pretended transfer of said 875 shares of stock to the defendants, Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill, the owners of 110⅔ other shares of the stock of the Chicago & Evanston R. R. Co.; that the defendants claim and pretend that the directors of said company shortly before the filing of this bill, made a call for payment of said stock in full, by a short date, fixed in said call, to meet indebtedness of said company, and declared the same forfeited for non-compliance with such call; and that they, said new directors, are now the nominal and pretended owners of said stock, but in reality hold the same in trust for the defendant, the Chicago, Milwaukee & St. Paul Ry. Co. That said pretended forfeiture or sale of said stock was caused by the defendants herein, under the fraudulent pretence that the purpose was to pay the indebtedness of the said company, when the real purpose was, under cover of a pretended forfeiture, to obtain the said shares of stock as well as said 875 shares without giving any consideration therefor, and to aid in the accomplishment of their said conspiracy, and obtain control of said company without regard to the rights of your orator, and to evade the performance of the contracts hereinbefore set forth. That at the time of said pretended forfeiture there were no debts of said company except those which by the terms of said contract said defendant Goudy is bound to pay, and save said company and the complainant harmless from; that said pretended forfeiture is fraudulent as to Stickney & Co. and the complainant, and should not affect their or his rights, but should be set aside by the court.

The bill further alleges the assignment by Stickney & Co. of all rights, claims and demands to the complainants; and offers to pay the said sum of twenty-five thousand dollars into court in such manner as the court shall direct, for the use of such of the defendants as are entitled thereto.

The bill prays that the pretended transfer of the stock, etc., to defendant Turner and to defendants Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson, and said election of said Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill as trustees, and of said Easton as president, and of said Wadsworth as secretary and treasurer of said Chicago & Evanston R. R. Co., and all forfeitures and all proceedings for forfeitures of said 875 shares or said 110⅔ shares of said stock, be set aside and declared null and void by the court. That the defendants Turner, Wadsworth, Easton, Walker, Hubbard, Merrill and Johnson be decreed to deliver, transfer and assign the said 875 shares and the said 110⅔ shares of said stock and said note and said claim, and the control of said Chicago & Evanston R. R. Co. to the complainant, and that said other defendants cause the same to be done so far as they have the control thereof; and that the defendant the Chicago & Evanston R. R. Co., do register and cause to be transferred said stock on the books of said company to the complainant, in accordance with the charter and by-laws of said company; that the title of the complainant in and to said property be quieted, that the defendants be perpetually enjoined and restrained from assigning or disposing of said stock, etc., to any person other than the complainant, and from voting or otherwise using said stock, and from permitting said Turner or said Easton,

Wadsworth, Walker, Hubbard, Johnson or Merrill, or any other person than the complainant, to vote said stock, and from recognizing said Turner, Easton, Wadsworth, Walker, Hubbard, Johnson, Merrill, or any other person than the complainant, as the rightful owner and holder thereof, and from taking any possession, control or management of, or in any manner intermeddling or interfering with said Chicago & Evanston R. R. Co. or its railroad or its franchise, or any of its rights, property, interests or privileges. In the meantime that a temporary injunction issue, etc., and for general relief.

All of the defendants answered, the answers consisting chiefly of denials, none of which it is material to set out except the answer of the North Chicago City Ry. Co., which alleged that on May 28th, 1880, there were one thousand shares of the stock of the Chicago & Evanston R. R Co outstanding, of which 889⅓ were held and owned, or absolutely controlled in the interest of the said North Chicago City Ry. Co. That it also held at that time the note set out in the complaint, and that said North Chicago City Ry. Co. was in the practical possession and control of the organization known as the Chicago & Evanston R. R. Co.; that the said shares of stock stood in the names of the defendants, Turner, Goudy, Chandler, Chase and Buckingham, who were directors of the Chicago & Evanston R. R. Co., and held the shares standing in their names solely for the account and benefit of the defendant the North Chicago City Ry. Co.

Defendant denies that said shares or said note were at that time in the possession or under the control of the defendant Goudy with authority to dispose of the

same in any manner which he might deem expedient; but it admits that Goudy had verbally agreed with the North Chicago City Ry. Co. for the purchase of said shares and of the indebtedness of said Chicago & Evanston R. R. Co. to the North Chicago City Ry. Co., then standing in open account upon its books, for the sum of twenty-five thousand dollars; that the said Goudy being unable to pay the said sum of twenty-five thousand dollars, time was given him for that purpose, terminable, however, at the pleasure of the North Chicago City Ry. Co.; that on the 28th of May, 1880, Goudy held simply an option terminable at the will of this defendant, to purchase such certificates of shares and indebtedness for the sum of twenty-five thousand dollars, to be paid by him to this defendant; said certificates of indebtedness remaining at all times in the control of the said Ry. Co., under no circumstsnces to be transferred to said Goudy except in payment in full of the money aforesaid.

That on or about the 28th day of May, 1880, Goudy represented to said City Ry. Co. that he was negotiating with Stickney & Co. for the sale of said certificates and indebtedness, but that he could not at present raise the money with which to pay the said sum of twenty-five thousand dollars, and desired to know definitely what amount of time would be given him for that purpose; that at or about the same time Goudy either explained or submitted to the City Ry. Co. a draft of his proposed contract with said Stickney, and it appearing therefrom that a time was thereby definitely fixed for the payment of money out of which the said Goudy would pay to the City Ry. Co. the said sum of twenty-five thousand dollars if the said Stickney, or the said Stickney and his associates, per-

formed the said contract on his or their part, this defendant consented to extend the time for the payment of said twenty-five thousand dollars to correspond with the times for the making of deferred payments, provided for in the contract proposed to be made by him with said Stickney, and on the said 28th day of May, 1880, entered into a contract in writing, which is fully set out in the answer, and which, so far as material, is as follows:

"This article of agreement made and entered into this 28th day of May, 1880, by and between the North Chicago City Railway Co., party of the first part, and William C. Goudy, party of the second part,

Witnesseth, that the party of the first part hereby sells and assigns to the party of the second part all the interest it has in the shares of the capital stock of the Chicago & Evanston R. R. Co., being about 890 shares, and also a promissory note or obligation of the Chicago & Evanston R. R. Co. to the party of the first part for the sum of thirty-six thousand eight hundred forty-seven and 78-100 dollars, without recourse. And the party of the second part agrees to pay to the party of the first part the sum of twenty-five thousand dollars therefor, as follows, to-wit:

The 875 shares of the stock shall be assigned to John De Koven as trustee, and the said note or obligation shall be assigned and delivered to him as trustee, to hold the same until the said sum of twenty-five thousand dollars shall be paid to the said John De Koven, as trustee, under a contract of even date herewith between Stickney & Co. and Goudy, or until there shall be default in the payment of the sum of fifteen thousand dollars and twenty thousand dollars, or twenty-five thousand dollars, as therein provided.

And it is further agreed by the parties hereto that there shall be paid from the payment of fifteen thousand dollars mentioned in said contract, between the said Stickney & Co. and Goudy, the sum of twelve thousand five hundred dollars, and from the payment of twenty thousand dollars mentioned therein the fur-

ther sum of twelve thousand five hundred dollars, making the whole amount of twenty-five thousand dollars.

And in case said payments of said fifteen thousand dollars and twenty thousand dollars shall not be made because of the default of the party of the second part, and the said A. B. Stickney & Co. shall pay the sum of twenty five thousand dollars in lieu thereof as provided in said contract, then the whole of said sum of twenty five thousand dollars shall be paid to the party of the first part.

When said payment of twenty-five thousand dollars is fully made to the party of the first part, all its interest in said stock and notes shall cease and be subject to the order and control of the party of the second part. If the said sum of twenty-five thousand dollars shall not be paid as aforesaid then the shares of stock and evidence of indebtedness shall be assigned and delivered by the said DeKoven, trustee to the said party of the first part or to such person as it shall designate.

The said contract between the said A. B. Stickney & Co. and the said party of the second part, which is deposited with said DeKoven, is referred to for greater certainty.

This agreement shall be an order to the said De Koven, trustee, to pay the sum of twenty-five thousand dollars as aforesaid, to the party of the first part, and in default, to assign said 875 shares of stock and said note to the party of the first part."

The answer proceeds at considerable length to make admissions and denials, but sufficient has been quoted to show the connection of the defendant the North Chicago City Ry. Co. with the case and the issues.

POINTS AND AUTHORITIES.

I.

The decree of June 8th, 1885, was not a final decree.

The specific relief prayed for in the bill was to set aside all the transactions which it was claimed had vested the ownership of the stock and the control of the Chicago & Evanston R. R. Co. in the defendants T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockafeller, Selah Chamberlain and George Smith, and to cause the same to be transferred to the complainant; and to that end that the company, through its old directors, (who, upon the setting aside of the transactions referred to, would have remained in the nominal control of the company,) to-wit, the defendants William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase and Ebenezer Buckingham, register or permit to be registered the transfer of said stock to the complainant, and the defendant De Koven, trustee, upon the transaction whereby the stock, etc., passed out of his hands, being cancelled, do duly transfer the same in accordance with such contracts, to the complainant. All of the defendants named, together with the Chicago & Evanston R. R. Co., were not only proper, but necessary parties to the bill for the purpose of obtaining the specific relief prayed for; and all had a common interest in defeating such relief. But the bill, while as originally drawn inadvertently omitted the prayer for general relief, was, as the court will see

by an inspection of the record, and is not denied but admitted by the motion papers, afterwards amended by incorporating the usual prayer for general relief, which justified any relief against any of the parties to the suit within the scope of the allegations of the bill. It is said by Mr. Justice Story, quoting from an eminent English barrister, that "general relief is the best prayer next after the Lord's prayer."

Note 2, Sec. 41, Story's Eq. Pleadings.

The bill was practically one to enforce specific performance of the contract by which Goudy undertook to sell and convey to the assignors of the complainant the Chicago & Evanston R. R. Co., and all its rights and franchises. As appears from the bill, Goudy, at the time the bill was filed, either had disposed of or was then attempting to dispose of and transfer said property to the defendants, Easton and associates, and so to put it out of his power to specifically perform his contract with the complainant. Until a final judgment against those parties it could not be known whether any relief could be had by personal decree against Goudy or not; but if upon final decree it had been found that he had disabled himself from specifically performing the contract in suit, the complainant insisted and will insist upon the hearing of this case upon the merits, in this court, that he was entitled to alternative relief in damages against Goudy. The North Chicago City Ry. Co., by reason of its claim of ownership of the stock in controversy was a necessary party to the action, and it will be claimed on the hearing on the merits, as it was in the court below, that by virtue of its adoption of the contract between Goudy and Stickney, and of its acquiescence in

the delay occasioned by the agreement between Stickney and Goudy for the extension of the time of peformance; that it also had waived the right to insist upon strict performance so far as the time was concerned, and that specific performance of said contract could also be enforced against it. Goudy's agreement with the Chicago & Evanston R. R. Co. expressly bound him to procure at his own expense all the right of way needed or necessary for the purpose of said company. When, therefore, a decree was rendered against said Chicago & Evanston R. R. Co. for a sum of money which the complainant had advanced Goudy, and which Goudy had used for the purchase of the right of way, the Chicago & Evanston R. R. Co. manifestly were entitled to a decree in their favor against Goudy for the recovery of any amount which it was compelled to pay the complainant.

DeKoven, the trustee, if it should be found, as is alleged in the bill, that he conspired with the other defendants in the case, and fraudulently surrendered the trust property to Goudy or Turner when he should have surrendered it to the complainant, was himself liable, and a decree might properly have been rendered against him and in favor of complainant in said action.

In addition to this, all of the defendants were charged with a conspiracy in urging forward and prosecuting to completion the very series of acts which resulted in the injury to the complainant complained of in said bill.

If Easton and associates took, as they claim, the stock from Turner in good faith, he representing that the North Chicago City Ry. Co. owned it, when, in fact, Stickney & Co. owned it, a remedy for fraud, or

the breach of the implied warranty of ownership, would be enforced in their favor against the City R. R. Co.

This rehearsal of the various issues and the connection of the several parties with the case, is for the purpose of showing that while the defendants might not have had a joint interest, they all had a common interest in defeating the claims of the complainant as set forth in the bill, and that they were so connected with each other and with the issues, that no final decree could be rendered from which an appeal could be taken which did not dispose of all the issues as to all the parties in the case.

The decree of June 8, 1885, does not profess to be a final decree against the Chicago & Evanston R. R. Co. nor against the defendants, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, E. J. Dickey, Hugh J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockafeller, Selah Chamberlain and George Smith. Nor does it indicate that the court had come to any determination as to what decree would finally be rendered against them. In his opinion Mr. Justice Harlan simply says:

"I incline to the opinion in this suit, which is to obtain the transfer of the stock to Stickney & Co. and for general relief, that it is within the scope and general purpose of this suit, as the court cannot give a decree to that effect, to give them a money decree to the extent that under the proof it appears that the defendants are in possession of the right of way which was paid for by their money. I think this case, therefore, must go to the commissioner to ascertain and report the amount paid by Mr. Goudy for the right of way. On the coming in of the report such further relief will be rendered as may be equitable and proper. And I incline to think now that the decree would probably be

a lien against the Chicago & Evanston R. R., *but it is not necessary to determine that now.* As to all the defendants except the ones which I have named, the case would be retained for the coming in of that report."

P. 15, Motion Papers.

The formal decree which was rendered pursuant to this decision, so far from rendering any final decree as to the parties hereinbefore named, states "that for the purpose of ascertaining the amount of money paid by the defendant Goudy for right of way in execution of the contract between him and Stickney & Co., this cause be retained as to the other defendants. That it be and is hereby referred to Henry W. Bishop to take additional testimony as to such amount, and that he make report of the amount so paid, and that on making of such report such further decree will be rendered as may be equitable."

Whatever might have been the present intention of the court, so long as the case was retained as against certain of the defendants for any purpose, it might, in its final decree have awarded any relief which it pleased, and which it thought just and equitable against them. This is clearly brought out by considering what the court actually did do in its final decree rendered on the 14th of July, 1887. When the decree of 1885 was made, it was evidently the impression of the court that relief might be administered against Wadsworth, Easton and the other parties then controlling the stock of the Chicago & Evanston R. R. Co. It was also its impression, as stated in the opinion, that any money judgment should be charged as a lien upon the franchises of the Chicago & Evanston R. R. Co.; but both these impressions were abandoned when the final decree was rendered, which, first, determined certain exceptions of both the com-

plainant and of the defendant. These were matters which might have involved very grave and important legal questions, and from the decision of which an appeal would lie to this court.

It then decreed "that the Chicago & Evanston R. R. Co. do forthwith pay unto said complainant the sum of $6513, together with interest upon the same from the 30th of January, 1887, at six per cent, and also the cost of said reference and the cost of this suit, for which plaintiff may have execution. It is further ordered and decreed that all other relief prayed in the complainant's bill be denied as against said defendant the Chicago & Evanston R. R. Co."

This again shows that the court had not theretofore made any decree which would have barred it from making any decree which it might deem just and equitable.

The decree proceeds, that "the complainant's bill be dismissed out of court for want of equity against the remaining defendants, Wadsworth, Easton, *et al.*, with their reasonable costs to be taxed by the clerk, and that they have execution therefor against the said complainant."

The rule of this court with reference to appeals from final decrees and the exceptions thereto, I believe can be accurately summarized as follows:

Until the rights of all the parties on the merits have been adjudicated, there has been no final decree from which an appeal can be taken to this court. The only exceptions are cases where a decree has been rendered, final as to all the parties and as to the extent of the relief; but where an accounting is required, not for the purpose of ascertaining and determining the extent of the relief to be incorporated in the decree, *but merely in aid of its execution after the extent of the relief has been fixed and determined*, or where the

matter is incidental to and not part of the main subject of the action.

In the case at bar, the Master acted, not in aid of any execution of the decree, *but as an assistant of the court in making the decree.* The litigation, as between the complainant and the Chicago & Evanston R. R. Co., had not terminated on the merits upon the entry of the first decree.

"The rule is well settled," says this court, "that a judgment or decree, to be final within the meaning of that term as used in the acts of Congress, giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties upon the merits of the case; so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. If the judgment is not one which disposes of the whole thing on its merits, it is not final."

Bostwick vs. Brinkerhoff, 106 U. S. 3.

Forgay vs. Conrad, 6 Howard, 201, which confessedly pressed the right of appeal to the furthermost limits, was the case of a decree directing that the lands and slaves constituting the subject matter of the action, should be delivered up to the complainant, and also directing a money judgment against one of the defendants, and that the plaintiff do have execution for the several matters aforesaid. The decree then directed that a master take an account of the profits of the lands and slaves ordered to be delivered up, from the time of the filing of the bill.

The court placed its decision upon the ground that the decree directed the property in dispute to be delivered to the complainant, and awarded execution. They said that "if the appellants must wait until the accounts are reported by the master and affirmed by

the court, they will be subjected to irreparable injury, for the lands and slaves will be taken out of their possession and sold, and the proceeds distributed among the creditors of the bankrupt before they can have an opportunity of being heard in this court in defense of their rights."

The court, while holding that a merely incidental accounting, entirely collateral for the main purpose of this suit, did not in that case prevent an immediate appeal, said, however, "We feel it our duty to say that we cannot approve of the manner in which this case has been disposed of by the decree; in limiting the right of appeal to final decrees, it was obviously the object of the law to save all unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it, decided in a single appeal."

In *Craighead vs. Wilson, 18 How. 199*, the decree settled the equities of the bill, but the amount to be distributed among the parties depended upon facts to be reported by the Master, and until the allotment to each one of the share to which he might be entitled, it was said that the decree could not be considered as final.

The court said:

"To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit."

Referring to the case of *Forgay vs. Conrad, 6 Howard*, they say:

"This decision was made under the peculiar circumstances of that case, and the principal ground on which the appeal was sustained, was that the property was decreed to be sold on execution; and if the defendants could not take an appeal until the return of the Master, their property under the decree would have been disposed of and beyond the reach of the Supreme Court, so that an appeal would be useless."

In *Winthrop Iron Co. vs. Meeker, 109 U. S. 180,* the court said:

"The whole purpose of this suit has been accomplished; the defendants are required to turn over to a receiver the entire property and records of the company; *the accounting ordered is only in aid of the execution of the decree;* the rights of the company and the defendant directors have been adjudicated and definitely settled. The complainants are entitled to the immediate execution of such a decree. The decree is final within all matters in the pleadings, and nothing remains to be done but to adjust the accounts between the parties, growing out of the operations of the defendants *during the pendency of this suit.* The case is altogether different from suits by patentees to establish their patents and to recover for their infringement; there, the money recovered is part of the subject-matter of the suit; here it is only an incident to what is sued for."

It is easy to see on which side of the line the case at bar lies. The relief against the Chicago & Evanston R. R. Co. is a part of the subject-matter of the action, just as a patentee is not entitled to recover his damages until the money judgment is determined as to its amount. The case is in neither case determined as between the parties on the merits, and until then there has been no final decree.

In re Palmyre, 10 Wheaton, 502, the rights of the parties had been ascertained, and nothing remained but to ascertain the amount of damages.

The court say:

"The decree was not final; the damages remained undisposed of, and an appeal may still lie upon that part of the decree awarding damages; the full case is therefore not finally determined in the circuit court, and we are of opinion that the case cannot be divided so as to bring up successively distinct parts of it."

These remarks are exactly applicable to the case at bar. The money recovered against the Chicago & Evanston R. R. Co., remained undetermined at and after the entry of the decree of 1885, until the entry of the decree of 1887; from the latter decree it is not denied than an appeal lies. The fact that the rights of the parties have not been finally settled by the decree of 1885 is clear from the fact that intermediate that decree and the final decree of 1887, they were actively contesting the principles on which the evidence should be submitted to the master, and the master's report, on exceptions thereto, on which they had a right to be heard in the circuit court and were heard, and on which they have a right to be heard in this court. As a case cannot be taken up in part, this conclusively shows that the former decree was not final, because the rights of all the parties litigant on the merits were not determined by it.

In *Beebe vs. Russell, 19 How. 283*, it was held that, in Chancery, a decree is interlocutory whenever an inquiry as to law or fact is directed preparatory to a final decision. Therefore, while the case is referred to a master to take an account of rents and profits upon evidence, and from an examination of the party, to make allowances affecting the rights of the parties and to report his results to the court, it was not a final decree. The court again refer to the case of *Forgay vs. Conrad*, and say, that that case was decided on the ground that all the merits of the controversy between the parties had been determined; that execution had been awarded; and the court further say, "The order of the court in that case for referring it to a master was peculiar."

"The decree awarding a permanent injunction and for an account of gains and profits, and that the cause be referred to a master to take and state the amount and to report to the court, is not a final decree."

Homiston vs. Stanthorpe, 2 Wallace, 106.

A final decree is one which finally decides and disposes of the whole merits of the case and reserves no question for the further discretion of the court from which an appeal could be taken. A decree that plaintiff was entitled to two-sevenths of certain property, and referring it to a master to take a report and account of it, reserving other questions until the coming in of the report, is not a final decree.

Perkins vs. Fournequit, 6 Howard, 206.

In the case at bar the accounting ordered was preparatory to the entry of a decree to be made, and not in aid of an execution of one which had already been made.

Pulliam et al. vs. Christian, 6 Howard, 209, was an action to set aside a trust deed. The court ordered a decree that the trustees should deliver over the property conveyed to them, which had not been disposed of, and render an account to the commissioner of all property which came to their hands under the deed, and all moneys paid to the creditors. An appeal was taken from this decree. The supreme court in dismissing it, said:

"This decree is final only as to the trustee. All the matters arising under the trust are referred to the commissioner for a statement of the account, to enable the court to enter a final decree. There is no sale or change of the property ordered, which can operate injuriously to the party."

In *Barnard et al vs. Gibson*, 7 *How.* 650, a decree for an injunction in a patent case was held not final and the appeal was dismissed. The court distinguished the case from that of *Forgay vs. Conrad*, assigning as one of the reasons for the distinction, that the execution of the decree in that case, to-wit, the case of *Forgay vs. Conrad*, would have inflicted on the defendant below an irreparable injury. They say that the course of procedure in the Circuit Court was irregular in that case, and the consequent injuries to the defendant would have been irreparable. "Effect should not be given to its final orders by the Circuit Court until the matters in controversy shall be so adjusted as to make the decree final; any other course of proceeding would in many cases make the appeal of no value."

In *Thompson vs. Dean*, 7 *Wallace*, 342, the decree directed the performance of a specific act and required that it be performed forthwith.

"The decree," said the court, "determined the principal matter in controversy between the parties; it decided the right of the property in contest, directed it to be delivered by the defendant to the complainant by transfer, and the complainant is entitled to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership."

It will be noticed that the accounting in this case was like that of *Forgay vs. Conrad* in aid of the execution of a decree already made, and not in assistance of the court in making a decree; and the same necessity existed which existed in *Forgay vs. Conrad*, from the fact that the Circuit Court had not only adjudicated upon the whole matter in issue, but had directed

an immediate transfer of the property in controversy; whereas in the case at bar, nothing passed to anybody by the preliminary decree or could pass. No execution was ordered against anybody. No costs were taxed as against anybody. While, as against the chief defendant in the cause, no decree was made, nor were the rights of the parties as to that defendant or the other defendants against whom the case was retained, determined; but for the very purpose of determining those rights, and of enabling the court to make a decree, the case was referred to the Master.

In *Oglesby vs. Knox Ins. Co., 2 Black, 539*, a decree that all moneys recovered be distributed among complainants, and appointing a master to state the account, was held not to be a final decree, and the appeal taken therefrom was held to be premature.

In *Railway Co. vs. Swagey, 23 Wallace, 405:*

"An appeal," say the court, "may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay over the proceeds. The sale in such a case is the execution of the decree. By means of it the rights of the parties as settled are enforced. But until the amount due is determined *and the property to be sold ascertained*, the rights of the parties are not all settled. *Final process for collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged.* Such adjudication requires the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the matter so that intelligent action may be had; and it is this action by the court that finally determines the rights of the parties."

The foregoing quotation exactly and entirely covers the facts in this case. I regard it as perfectly conclusive that the amount of expenditure by Goudy—which the court intimated in its decision might be chargeable against the Chicago & Evanston R. R. Co.—must be ascertained and inserted in the decree before the decree can be said to be final and the rights of the parties fully litigated.

See also to the same effect *Chase vs. Vasques, 11 Wheaton, 429.*

In the case of *Green vs. Fisk, 103 U. S. 518*, complainant filed a petition alleging that he was the owner of an undivided one half of certain real estate which was not susceptible of a division, and praying by petition division thereof by sale. The court below decreed that he was entitled to one half the property and referred the case to a master to proceed under the petition according to law and the direction of the court. From that decree an appeal was taken which was dismissed by the court on the ground that it was not a final decree.

The court say:

"A decree cannot be said to be final until the court has completed its adjudication of the case. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought. That is to say, a setting off to the complainant in severalty her share of the property in money or in kind; this can only be done by further decree of the court."

The supreme court has very recently given a very exact definition of the meaning of the term "final" in the case of *St. Louis, Iron Mountain & Southern Rail-*

road Co. vs. the Southern Express Company, 108 U. S. 24. The action was brought by the Express Co., to enjoin the Railroad Co. from interfering with or disturbing the Express Co. in the enjoyment of the facilities it then had for the transaction of its express business over the R. R. Co's railroad, so long as the Express Co. conformed to the regulations of the Railroad Co. and paid all lawful charges of the business. All these matters were determined and a decree entered in favor of the Express Co. The decree covered the carriage and fixed the compensation; it adjudged costs against the R. R. Co. and awarded execution.

Said the court: "Nothing more remains to be done, by the court;" but to dispose of the case there was a reference to a master to ascertain the compensation to be paid for the transportation during the pendency of the suit.

"This," said the court, "did not enter into the merits of the case; all such matters relate to the administration of the cause. They are incidents of the main litigation, but not necessarily a part of it."

The motion to dismiss was denied, on the same distinction to which I have before repeatedly referred, between a money recovery embraced within the pleadings and an incidental thing growing out of but not embraced in the subject matter of the suit.

In ex parte Norton, 108 U. S. 237, a writ of mandamus to the circuit court compelling the allowance of an appeal was granted. The court said:

"The decree settled every question in dispute between the parties, and left nothing to be done but to complete a sale under proceedings in the state court for a foreclosure, and to hand over to Norton any surplus of the proceeds after paying the mortgage debt."

The mandamus in that case was to compel the circuit court to take jurisdiction of an appeal from the district court in a bankruptcy proceeding. A decree without taxation of costs and without specifying the sum for which it is rendered, is not final.

Wheeler vs. Harris, 13 Wallace, 51.

In the case of *Dainese vs. Kendall, 119 U. S. 53*, a bill was filed to set aside a sale under a deed of trust, and for an accounting of the rents and profits, pending a motion for a reference to an auditor to make distribution of the proceeds of sale, an appeal was taken to the supreme court of the United States; this court said:

"It is apparent that the decreee appealed from is not a final decree. The litigation of the parties on the merits of the case has not been terminated. An account of the rents collected has not been taken. The amounts due on the notes held by the complainant and defendant respectively have not been ascertained. All this is necessary for the relief asked for in the bill. The authorities are uniform to the effect that a decree to be final for the purpose of an appeal must leave the case in such a condition that if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered."

The case of *Parsons vs. Robinson, 102 U. S. 112*, was an action to foreclose a railroad mortgage in which the trustee of the mortgaged railroad and others were respondents, and one bondholder originally, and another by intervention, were complainants.

A decree was entered, finding that the railroad company had made default in the payment of the interest, that the plaintiffs were entitled to have and sell all the mortgaged premises according to the provisions in the mortgage contained, upon the failure of

the defendant to pay within the time to be "hereafter" fixed, the amount of the bonds and coupons now outstanding which were entitled to the security of the said mortgage. And for the purpose of finding this amount the case was referred to masters to ascertain and report the amount due upon the bonds, principal and interest, which were entitled to the security of said mortgage, and also to report what liens, if any, were prior to the bonds, or to any and what bonds secured by said mortgage, and also to ascertain and report the extent of the liens of the said mortgage upon the railroad, franchises, etc.

Afterwards the masters filed their report; and on consideration thereof the court ordered that the company pay the amount found due by the masters, etc., with interest on or before a date fixed; that in default thereof the defendants, naming them, be absolutely barred and foreclosed of and from all right of redemption; and in default of such payment, the court further ordered a decree that the defendant, the trustee in the mortgage, sell the mortgaged property at such time and place and in such manner as the court shall hereafter determine.

And it is further ordered, that the cause be referred to the masters heretofore appointed, with instructions to report to the court the extent and amount of all liens prior to the general mortgage, and also to report to the court full and detailed statements of the several properties subject to its lien. And it is further ordered that said masters do prepare and report to the court an order of sale and form of advertisement.

From this decree an appeal was taken.

"The first question," said the court, "that we will consider, is whether it is a final decree within the meaning of that term, as used in the statutes, which provide for appeals to this court from the final decrees of the circuit court in cases of equity jurisdiction. That a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree, for the purpose of an appeal, is no longer an open question in this court."

Here, however, there is as yet no decree of sale.

As was said in *Railroad Co. vs. Swasey, 23 Wallace*, "To justify such a sale without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined; until this is done, the rights of the parties are not all settled, and *final process for the collection of money cannot issue until the amount to be paid or collected by the process if not paid, has been adjudged.* So, too, process for the specific property cannot issue until the property to be sold has been judicially identified.

In this case the amount due upon the debt has been ascertained and its payment by a date certain ordered; but the extent and amount of all liens, prior to said general mortgage upon the property thereby covered, have not been determined, and full and detailed statements of the several properties subject to the lien of said general mortgages have not been furnished to the court. Neither has it been determined what the order of sale of said mortgaged premises shall contain, nor what shall be the form of the advertisement therefor. The court has indeed, declared its intention of hereafter directing such a sale; but as it requires further information to enable it to act understandingly in that behalf, has sent the case again to the masters with instructions to answer and report upon the matters in doubt.

Until the particulars of the prior liens are ascertained, the property identified, and the time, place and manner of sale determined, the rights of the parties will not have been sufficiently settled to make it proper in the opinion of the court as expressed in its present decree, to direct that the sale go on. All these matters still remain for adjudication, and the decree as it now stands had not terminated the litigation between the parties on the merits of the case; consequently it is not final, and the motion to dismiss must be granted."

In the case at bar the court had declared its intention to render some sort of a decree in favor of the complainant for the amount of money advanced by

him which could be traced into the right of way of the Evanston road; but whether that decree should be against the Evanston Co. alone, or against that company and the other defendants, the holders of its stock, against whom the suit was also retained, and whether the amount of recovery should be charged as a lien upon the Railroad Co's property and franchises, were as yet unsettled, and were never adjudicated until the final decree of 1887.

In *Burlington, Cedar Rapids & Northern R. R. Co. vs. Simmons, 123 U. S. 52*, a bill was filed by a junior mortgagee against a mortgagor and a prior mortgagee to foreclose his mortgage and to establish his right to redeem the prior mortgage. The defence was, that under certain proceedings had for the foreclosure of the prior mortgage, his right to redeem had been cut off and the mortgaged property sold free from his lien.

The decree appealed from found "that the junior mortgage was still a valid and subsisting lien, and that the right of its trustee and beneficiaries to redeem had not been cut off by the proceedings for the foreclosure of the earlier mortgage; that those claiming title under the sale on the foreclosure of that mortgage, and certain other parties were entitled to redeem the junior mortgage by paying off the amount thereof at such time as shall hereinafter be fixed and determined by a further order or decree to be entered in this cause. In case none of the parties claiming under the prior mortgage redeem the junior mortgage, and the junior mortgage redeems the prior one, then that the junior mortgage shall be foreclosed and the sale of the property shall be had under a decree to be entered by this court and the proceeds shall be applied, first, to paying off the amount paid to redeem from the first mortgage, second, the amount found due on

the second mortgage, and the balance, if any, paid to the mortgagor."

"In the event that none of these parties shall redeem from the others, then a sale of the mortgaged property shall be had, pursuant to such decree as may hereafter be entered herein, and, from the proceeds, shall be paid off, first, the amount which it may be hereafter determined is due on the first mortgage; second, the amount which it may hereafter be determined is due on the second mortgage, and third, the balance, if any, to the mortgagor. It was then ordered that for the purpose of determining the amount necessary to be paid by any of the parties in making redemption, the cause be referred to a master to find and report the amount due on both the first and second mortgages;" in accordance with certain principles of accounting which were specifically stated.

The whole then concluded as follows:

"This decree being interlocutory, it is ordered that the said cause stand continued for further orders and decree."

Calling a decree final or interlocutory does not make it so. The decree in that case was no more interlocutory than the decree of 1885 in the case at bar. The one referred the cause to a master to find and report the amount due in accordance with certain principles of accounting fixed in the decree, and declared that the case should stand continued for further order and decree. The case at bar was referred to a master by the decree of 1885, to find and report the amount due, but the principles on which the accountings were to be had were not fixed in the decree but left to be adjudicated on exceptions to the master's report, and the decree proceeded to declare "that on the making of such report, such further decree will be rendered as may be equitable."

Page 16, Motion Papers.

I do not think that the cases are substantially different upon the point involved in this argument; but if there is a difference, the difference is in favor of the interlocutory character of the decree of June, 1885, in this case. The court said in the case just cited:

"The right of the junior mortgagee to redeem the prior mortgage has been established by the decree appealed from; but the amount he must pay has not been determined. The validity of his lien, as security for the amount due, has been declared; but what that amount is has not been fixed. His right to a sale of the mortgaged property in case of debt if not paid, has been settled; but such a sale cannot be made until a further order to that effect is entered. The litigation has not been ended."

The court held that there had been an actual decree of sale, and the motion to dismiss was granted.

In *R. R. Co. vs. Southern Express Co., 108 U. S. 24*, the point was to establish the liability of the railroad company to carry the express company's freight. The decree required the carriage, and adjudged the sum to be paid; it adjudged costs and awarded execution. Nothing more remains to be done by the court to dispose of the case. The reference was to ascertain the compensation for the transportation during the pendency of the suit. All such matters relate to the administration of the suit.

Of the cases cited in the motion papers under this head in support of the motion, most of them are cited as distinct authorities in opposition to the motion by me. It remains to notice those cases relied on by the motion papers and not cited by me.

In *Whiting vs. Bank of the United States, 13 Peters, 15*, there was a decree which was held final and

appealable; it was *an absolute decree of foreclosure*, and that the premises should be sold by commissioners. And under that decree a sale was had, and the court held that the original decree of foreclosure and sale was final upon the merits of the controversy, and the defendants had a right to appeal from that decree as final upon those merits as soon as it was pronounced, "in order to prevent an irreparable mischief to themselves, for if the sale had been completed under the decree the title of the purchaser under the decree would not have been overthrown or invalidated by a reversal of the decree, consequently the title of the defendants to the lands would have been extinguished and their redress upon the reversal would have been of a different sort from that of the restitution of the land sold.'"

The same reason which prompted the court to sustain the appeal in *Forgay vs. Conrad* existed here, although the case was a much plainer and simpler one, as there was no reference for any purpose, and nothing left for the court to do, the adjudication of the rights of all the parties to the controversy and of all the questions within the scope of the pleadings having been adjusted by the decree of foreclosure and sale.

The case of *French vs. Shoemaker, 12 Wallace. 97*, as stated in the motion papers, explains itself, and shows that a decree in that case was clearly a final one, in which was inserted the common order of "leave to apply."

The case of *Bronson vs. Railroad Co., 2 Black, 524*, cited in the motion papers, is a case illustrative of the distinction that an intervenor claiming a fund in court, having no interest in the main litigation, may appeal from a decree disallowing his claim.

The decree in *Stovall vs. Banks, 10 Wallace, 583*, also cited in the motion papers, was upheld upon the ground that a decree which adjudges a certain sum of money to be due from a defendant to the complainant and awards execution to collect it, is a final decree, conclusive upon the parties, which is very different from the case at bar.

II.

One party having a common interest cannot, in a suit in equity, appeal while the case remains undetermined as to other parties.

It is claimed in the motion papers that if a case is decided as to some of the parties, although not as to all, that a decree is final as to the former, and that a separate appeal lies by them, leaving the case to proceed to final adjudication as to the remainder in the circuit court.

Except in the cases of matters purely collateral, as where parties intervene to claim a fund in court who have no interest in the main litigation, and whose proceeding, although nominally in the case, is in reality a separate and independent matter, the doctrine contended for in the motion papers finds no support in any of the decisions of this court. It has already been seen how closely and intimately all the parties defendant in this case are related to the main issues tendered by the bill of complaint. *Until the rights of all the parties on the merits* have been adjusted, there has been no final decree from which an appeal can be taken.

United States vs. Girault, 11 How. 22.

That case was an action at law against four defendants on a bond; under the law of the State where the cause of action originated, the obligations of the defendants were both joint and several; and upon a joint action separate judgments might be taken against the several defendants, either by default or on verdict. One of the defendants, although he was personally served with process, did not appear. The plaintiff did not proceed to judgment, nor discontinue his proceedings as to him. As the case stood, there was a joint suit against four defendants on a bond, a judgment in favor of three, and the suit as to the fourth undisposed of. The defendants against whom judgment was rendered sued out a writ of error to this court.

On motion to dismiss, the court said:

"The practice in this court in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in."

This is also the rule in the King's Bench in England, citing *Metcalf's case, 11 Coke, 38.*

It is there laid down, by the second resolution, "that by the words in the writ are intended not only a judgment in the chief matters in controversy, but also in the whole of them, so that the suit may be at an end. The reason given is that if the record should be removed before the whole matter is determined in the court below, there shall be a failure of justice, as the King's Bench cannot proceed upon the matters not determined, and upon which no judgment is given, and the whole record must be in the Common Pleas or the King's Bench. It is entire, and cannot be in both courts at the same time. The writ is conditional and does not authorize the court below to send up the case unless all the matters between all the parties to the record have been finally disposed of. The case is

not to be sent up in fragments by a succession of writs of error."

Citing *Peet vs Meeker*, *31 Wendell*, *667*.

It is supposed, that inasmuch as judgment is allowed to be entered separately against two or more defendants sued jointly upon a bond or note, according to the statute of Mississippi, the severance of the cause of action is complete, and that—

"Any one defendant against whom judgment may be thus entered can bring error, although the case has not been disposed of as to the other defendants. And for a like reason when a judgment is rendered in favor of one defendant against the plaintiff, the latter may bring error before the suit has been disposed of in respect to the others; but we have seen that the practice is otherwise under this statute, and that final judgment cannot be properly entered against any of the parties, until the whole case is disposed of, and that any neglect in the observance of the rule exposes the judgment to a reversal on error in the appellate court. According to the practice of this court the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction and remanded to the court below to be proceeded in and finally disposed of."

The case of *Todd vs Daniel*, *16 Peters*, *521*, cited in the motion papers, was not a case of an attempt to remove a part of a cause of action before it had been fully adjudicated as to all the parties, but it was an appeal by all of the defendants from an absolutely final decree. And while the appeal was pending, part of the defendants having abandoned it, the only point was whether the remaining defendant and appellant should be permitted to prosecute the appeal. The court held that where some of the parties refused to appeal while others desired to prosecute an appeal the correct practice was, notice in the nature of a process and severance in a writ of error to be issued in the court below,

requiring them to become parties in the appeal; and upon their refusal the parties desiring to appeal would be held at liberty to do so, and the court held that what had taken place in that case was equivalent to that. And this was all that was decided in the case.

So in the case of *Forgay vs. Conrad*, cited in the motion papers under this head, all the defendants interested in the property involved in a portion of the decree appealed from, appealed; other defendants, who claimed other property which had been conveyed to them at different times and by separate conveyances, did not join in the appeal; and the court held that they were not necessarily parties to the appeal, relying simply upon the authority of *Todd vs. Daniel*, just examined. Upon that part of the case there was no question considered as to the right of one party to take an appeal before the case was finally adjudicated as to all.

The case of *Withenbury vs. United States, 5 Wallace, 819*, also cited in the motion papers, was as stated therein a consolidation of several suits or libels in admiralty, and various claims were interposed for the property, among them the claim of Withenbury and Dowell.

This case illustrates the very distinction with which I commenced this head of the argument. It was the case of the intervention of a party claiming a lien upon a fund in court, but having no interest in the main controversy. Practically it was a separate and independent proceeding. As the court well said in its decision, "it was final as to complainant and his rights, and it was final also so far as the claimants and their rights were concerned. It left nothing to be liti-

gated between those parties. It awarded execution in favor of the libellants against the claimants. We think that such a decree in an admiralty case must be regarded as final within the meaning of the judiciary acts."

Here also the question was not as to the right of appeal, but a full and final adjudication on the merits as to all parties having been reached, it was merely as to the right of parties whose interests were entirely distinct from the merits of the main controversy having the right to take an appeal without joining others who had no interest, either common or joint, in the matters involved in the appeal.

Germaine vs. Mason, 12 Wallace, 259, cited in the motion papers, was an action to recover a money judgment against the defendant Germaine, and to enforce a mechanics' lien against a house and lot for a debt. The court rendered the final judgment, being a money judgment against Germaine, and made the same a lien upon the real estate. After the final decree had been rendered as to all the parties to the suit, Germaine sued out a writ of error to this court. Certain lien creditors of Germaine, whose liens were subsequent to the mechanics' lien in controversy, had been made co-defendants with him, and acquiesced in the judgment declaring the lien a first lien, and did not appeal. The case is based on precisely the same principle as the case of intervenors claiming a fund in court and having no interest in the main subject of the controversy.

The case of *Milner vs. Meek, 95 U. S. 252*, also cited in the motion papers, was a proceeding in bankruptcy. Meek was the assignee in bankruptcy, and as such contested the allowance of a large number of

claims filed against the bankruptcy estate. The case came on to be heard in the circuit court upon appeal from the district court. One of the lien creditors whose lien was disallowed by a final decree of the court, appealed to this court. It was objected that the appeal did not lie because all the other creditors who had filed claims had not joined in the appeal. The court, in accordance with common sense views, and on the line on which cases to which I have been referring were decided, said "that his appeal brings up so much of the case and such of the parties as are necessary to the determination of his rights."

This case also rests upon the same principle that runs through all these cases, that a claimant upon a fund in court, having no interest in any other matter may, after the final adjudication disallowing his claim, take a separate appeal, as it is really for all practical purposes a separate and independent proceeding as to him and his rights.

These are all the cases cited under this head in the motion papers.

In order to see the distinction between such cases and the case at bar, the court is referred to *Owings vs. Kincannon, 7 Peters, 399*, which was an appeal from a decree in equity, by which a large number of defendants were directed to convey or release to the complainant their right, title and interest in a tract of land, mentioned in the decree. An appeal was taken by certain of the defendants, but not by all. A motion was made to dismiss the appeal.

The court said:

"Upon principle it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal. By the judiciary act

decrees in chancery proceedings in the circuit court could be brought before this court only by writ of error. The appeal was given by the act of 1803. That act declares that such appeal shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. Previous to the passage of this act, the decree under consideration could have been brought into this court only by writ of error, in which writ all of the defendants must have joined. The language of the act, which gives the appeal, appears to us to require that it should be prosecuted by the *same parties* who would have been necessary in the writ of error. We think, also, that the same principle would be applicable from the general usage of chancery, to make one final decree binding on all the parties united in interest."

In the case of *Williams vs. Bank of the U. S., 11 Wheaton, 414*, Chief Justice Marshall stated that a writ of error must be dismissed, it having issued irregularly. The judgment was a joint judgment upon a joint action for money lent, against three defendants, one of whom sued out a writ of error in his own name only, without joining the others. The court was of opinion that the writ of error ought to have been in the name of the three, and that if the others should refuse to join in it, it would deserve consideration whether the present plaintiff might not have summons and severance. The writ of error was dismissed.

In Masterson vs. Herndon, 10 Wallace, 416, a bill in equity was filed against S. A. Maverick and J. H. Herndon, defendants, and a final decree was entered "that the complainant have and recover from the said S. A. Maverick and the said J. H. Herndon the tract of land in the bill described, and that his title in the same is hereby decreed to be free from all clouds cast thereon by the said defendants."

From this decree Herndon appealed.

In regard to Maverick, the petition, which was signed by counsel only, was thus: "Your petitioner says that his co-defendant refuses to prosecute this appeal with him."

On a motion to dismiss the appeal, Mr. Justice Miller delivered the opinion of the court, saying:

"It is the established doctrine of this court that in cases of law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases all the parties against whom the decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. Second, that the appellate tribunal shall not be required to decide a second or third time the same question on the same record. We should have held this appeal good if it had appeared in any way on the record that Maverick had been notified Such a proceeding would have enabled the court below to have executed its decree so far as it could have been executed on the party refusing to join, and it would estop that party from bringing another appeal for the same matter. *The latter point is one to which the court has always attached much importance, and it has strictly adhered to the rule under which this case must be dismissed; and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy so far as it has been possible to adhere to it without hazarding the substantial rights of the parties interested.*"

The closing language of the opinion which I have italicized, clearly shows that whatever may be the rule with reference to the allowance of separate appeals in suits in equity, where the decree is not technically a joint one, after a final decree has been rendered, adjudicating and determining the rights of all parties, and all the matters within the scope of the pleadings,

it is the settled doctrine of this court, that no decree can be appealed from by anybody which is not final in the sense suggested, except in those rare and exceptional cases where by reason of the error of the circuit court in making a final decree as to certain parties and directing the transfer of the property in litigation, while retaining the case for adjudication as to other points or parties, it becomes necessary to allow an appeal and supersedeas at once, to prevent the injury resulting from the present execution of the decree, whereby, pending the appeal, the property might pass beyond the control of the court or the reach of any decree or execution which it might thereafter make or order. We have no such case here.

The case of *Simpson vs. Greeley, 20 Wall. 252*, is one in which Greeley sued Simpson and eight other persons to recover certain lands, together with damages for their detention. Judgment was given that the plaintiff have and recover of and from said defendants the lands, and that they recover from the defendant Simpson a certain sum of money, the value of rents, issues and profits, and for timber taken from the land; and the plaintiff have and recover from the other defendants a certain other sum of money to be credited as part of the first sum if collected. The defendant Simpson alone sued out a writ of error from this court, which was dismissed on motion of the plaintiff. In doing so the court said, in referring to the case of *Owings vs. Kincannon, 7 Pet.:*

"Reference was made in the opinion in that case to a former decision, to-wit, *Williams vs. Bauk, 11 Wheaton*. But the court not relying merely on authority, decided that it was correct as a matter of principle that the whole case ought to be brought be-

fore the court at the same time, and that all the parties united in interest ought to unite in appeal, as appeals are subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. Since those decisions were published the question has frequently been presented to this court and has uniformly been determined in the same way."

In closing the opinion the court say:

"*Viewed in the light of these suggestions, it is quite clear that the writ of error in this case must be dismissed, as all the defendants are directly or indirectly affected by the judgment, in respect to the damages, rents, issues and profits, as well as the judgment that the title to the lands described in the declaration is in the present defendants. Such a controversy cannot properly be re-examined here by installments, nor unless all the parties to be affected by the result are before the court.*"

But the question here is not under what circumstances any specified defendant could have appealed, or at what period in the prosecution of the case; but it is, "was there a final decree in 1885 affecting the rights of the complainant from which he could have brought to this court those certain installments of the case involved in the right to a remedy for damages against Goudy, the right to hold the North Chicago City Ry. Co. bound by any decree for specific performance which might be made, the right to a decree against DeKoven for wrongfully and fraudulently surrendering the trust property, the right to a decree against the other defendants, the old directors of the Chicago & Evanston R. R. Co., to compel them to register and retransfer all the stock to the complainant; leaving the right of complainant to recover of the Chicago & Evanston R. R. Co. the money advanced by the complainant to Goudy, and by him invested in purchasing right of way for the Chicago & Evanston

R. R. Co., and the right of the Chicago & Evanston R. R. Co. to recover of Goudy under its contract—by which Goudy agreed to obtain the right of way at his own expense—all sums so recovered of them by the complainant, as well as the question of the right of complainant to recover from Easton and his associates, the purchasers of the stock of the Evanston Co., of the same sum, undetermined."

III.

The appeal from the final deccee of 1887 does bring up for review every question which was determined by any interlocutory order or decree made during the pendency of this suit.

In the case of *Crosby vs. Buchanan, 23 Wal. 420*, cited in the motion papers, (although for what purpose I cannot see), a bill was filed by the heirs of Allen against the defendants, in which the relief prayed was, first, a cancellation of a deed by Allen to Vint, as having been fraudulently secured by Vint; second, that if this was not decreed, then on payment by the complainants of the balance, with interest, for a specific performance by Vint of his contract to convey the estate, which he had agreed to convey if fourteen thousand five hundred dollars ($14,500) were paid in five years; third, if the court would make neither of these decrees, then that it would decree that Vint should refund, with interest, the $11,600 purchase money that had been paid to him.

The court in 1853 made a decree refusing to decree a cancellation of Allen's deed; refusing also to decree that Vint should specifically perform his agreement to

convey; but as to the return of the $11,600 purchase money, the court said it could not pass on that matter, the proper parties not being before the court, and made no decree about it.

The court, by a decree made in 1872, refused to order a return of the purchase money, and made a decree dismissing the bill. The first question presented was as to the power of review which this court had over the several orders contained in the decree of 1853, from which there had been no appeal. An appeal having been taken from the final decree of 1872, dismissing the bill, the court said:

"In 1853 the court determined that it would not decree a cancellation of the Allen deed, and would not order a specific performance by Vint of his contract. This determination it caused to be recorded, but at the same time declared that it could not then make a final disposition of the whole cause, because it did not have before it all the parties necessary for that purpose. In 1872, when that cause was ready for final hearing, the court accepted this recorded opinion as settling the rights of the parties as far as it went, and then proceeded to consider the question which had not been determined. Upon this hearing that question was decided against the complainants in the cross bill, and then a final decree was rendered denying the relief asked for by the defendants. This ended the case in the court below. Cases cannot be brought to this court upon appeal in parcels. We must have the whole of a case or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done but to enforce and give effect to what had been decreed. But until all the rights of the parties have been passed upon and settled, this cannot be the condition of the case. Nothing must be left below when an appeal is taken, but to execute the decree. That was not the condition of this case in 1853. An appeal then would have left the question of the return of the purchase

money undetermined. The rights of the parties as presented by the pleadings were not all settled. The powers of the court below were not all exhausted. If the remaining question had been settled in accordance with the prayer of the cross-bill, the present appellants might have been satisfied and the appeal saved. We are therefore of the opinion that the appeal of 1853 was not final so far as it respects the Allen title, and that the appeal brings up the whole of that part of the case for our consideration."

The case of *Turner vs. Farmers' Loan & Trust Co., 106 U. S. 552*, upon which the motion papers seem greatly to rely, will be seen to be clearly and decidedly in our favor when carefully examined. The case was commenced in the state court and removed into the U. S. court, where a motion to remand was denied. A final decree of foreclosure and sale was duly rendered from which an appeal might have been taken, as nothing remained for the court to do but make a formal order of the confirmation of the sale; but an appeal was merely taken from the order confirming the sale, the decree of foreclosure was not appealed from. The court very properly declined to consider any questions except those arising out of the formal order of confirmation, saying:

"The final decree necessarily involved, and was itself, a judicial determination, as between the parties, that the suit was one of which that court might take cognizance. That decree, unmodified and unchallenged by any direct appeal therefrom, should, upon this appeal, only from the order confirming the sale, be deemed conclusive, between the parties and their privies, as to all matters in issue and by it adjudicated, *including the questions of jurisdiction* now pressed upon our attention."

The final decree in that case, ordered and adjudged the defendant within twenty days to pay six millions

and upwards of dollars, which it ascertained was the amount due on the mortgage sought to be foreclosed, with interest from the date of the decree; that in default of such payment, the equity of all the defendants be forever barred and the property be sold as an entirety. The sale occurred, under the decree in 1878, was reported to the court, and on the 23rd of December, 1878, an order was entered confirming and approving the sale from which the appeal was taken.

The court further said:

"When the Circuit Court assumes jurisdiction of the case, the party denying its authority to do so, may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction. In the present case we have seen that the appeal is only from an order confirming the sale. Appellants elected not to appeal from the final decree, although it necessarily involved every question affecting the jurisdiction of the Circuit Court. That decree is consequently not before us for any purpose except to ascertain from an inspection thereof whether the sale was conducted in conformity with its provision. *In such cases, upon the final appeal, not from the final decree, but only from an order in execution thereof, the court will not examine the record prior to such decree to see whether the petition for removal was filed in due time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different states; but will assume that the final decree being passed by a court of general jurisdiction, was within the power of the court to render.*"

This case turns upon the well recognized distinction which I have insisted on, all through this brief, between acts by which the relief to be granted is ascertained, and acts in enforcement of the decree awarding that relief, after such decree has been entered. The order confirming the sale was ancillary here to

the final decree, and was in execution thereof, as the court says, but was not the final decree itself. Had the appeal been from the decree itself, the case is an express authority for the position that interlocutory orders occurring at any time in the course of the proceedings would have been considered and reviewed.

The case of *Sage vs. R. R. Co., 96 U. S. 712*, was like the case just commented upon,—an appeal from the order confirming the sale, and the court held that for relief against the sale, resort can alone be had to appeal from the decree of confirmation; but that the final decree of foreclosure and sale was the *final* decree in the action, and *that all questions arising in the suit prior to the sale*, and *all questions upon the merits of the action*, must be raised and determined upon an appeal from the *final decree of foreclosure and sale*, which was also pending in this court at the time of the decision in that case.

In *U. S. vs. Smith, 11 Wheaton, 547*, the court said:

"The present case, being brought here on writ of error, the whole record is under the consideration of the court."

In the case of *The State of Minnesota vs. Bachelder, 1 Wal. 109*, the record contained an order sustaining a demurrer made in the course of the action, certain issues of fact were afterwards tried and final judgment entered. The court considering, as in the last case, the whole matter before it, reversed the judgment of the court below, and remanded the cause with instructions to enter another judgment, overruling the demurrer, and to issue a *venire de novo*.

In the celebrated case of *Dred Scott vs. Sandford, 19 Howard, pp. 394-403*, the judgment of the court, in the course of the proceedings, on a plea in abatement, was considered on a writ of error from the final judgment, the court saying:

"The plea in abatement and the judgment of the court upon it, are a part of the judicial proceedings in the circuit court, and are there regarded as such, and the writ of error always brings up to the superior court the whole record of the proceedings in the court below."

IV.

An appeal was taken from the decree of 1885.

If, however, in order to save our rights, we must object to the interlocutory decree, dismissing the bill as to various defendants, we certainly did, in open court pray, and the court, in the decree itself, allowed an appeal. The omission to file the record until a final decree was rendered against all the parties, was not *laches* on our part because, according to the custom and practice of the court of King's Bench, which this court follows (see *U. S. vs. Girault, 11 How. 22*), the record could not be in both courts, and we were excused from filing it until, a final decree as to all the parties having been entered, it became proper for the first time to bring the whole record into this court.

The omission to file the bond may be remedied now (*Bigler vs. Waller, 12 Wall. 142*), and we are ready to file any bond which the court shall order.

V.

No citation necessary, and no point made on that in motion papers. If necesssary, the general appearance has waived it.

The last appeal from the final decree of 1887, as well as from the previous one, was made in open court, the amount of the bond fixed, and the bond given and approved, pursuant to the terms of the decree itself. As the court says in *Sage vs. R. R. Co., 96 U. S. 712,*

"If a security is given and accepted in open court during the term at which the decree appealed from is rendered, no citation is necessary because the parties being presumptively present during the whole term, are charged with notice of all that is done affecting their interests. Whenever, therefore, security for an appeal is accepted during the term, an appeal is allowed."

No question, however, in respect to a citation, arises here, because the appellees have made a general appearance as follows:

In the Supreme Court of the United States.

JAMES J. HILL vs. CHICAGO & EVANSTON R. R. CO. *et al.*

Appeal from the Northern District of Illinois.

To Gordon E. Cole, Esq., Solicitor for Appellant:

You are hereby notified that on the 20th December, 1885, motions will be filed in the Supreme Court of the United States to dismiss the appeals in the above cause, which motions and the suggestions and authorities in support thereof are to be found in the attached brief, a copy of which is hereby served on you.

(Signed) E. WALKER,
W. C. GOUDY.

The gentlemen did not sign their names as attorneys for defendants, but as they were the attorneys for the defendants in the court below, I suppose it fair to assume that they are such now.

The motion papers, or the motions themselves, printed on the 19th and 20th pages of the printed motion papers, make no point upon the omission to serve a citation.

It will appear, I think, by the record, when printed, that all the proceedings with reference to the allowance of the appeal and the giving of security took place in open court.

VI.

The record is voluminous, and parties are not agreed on the issues involved. The motion should be postponed until the hearing when the record will be printed.

But finally, on behalf of the appellant, I object to the hearing of this motion at this time. The record has not been printed, and counsel by no means agree as to what it contains. Indeed, so complicated are the issues, and so voluminous the pleadings, that it will be impracticable for the court to determine upon the varied statements made in the motion papers as printed, and in the brief herewith submitted, without a careful examination of the record, upon the merits of this motion. And in support of this objection, I refer the court to its decision in *National Bank vs. Insurance Co., 100 U. S. 43.*

GORDON E. COLE,
Solicitor, and of Counsel for Appellant.

Office Supreme Court U. S.
FILED.
MAR 2 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES J. HILL, Appellant,

vs.

The Chicago and Evanston Railroad Company, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith.

BRIEF FOR APPELLANT.

M. D. GROVER,
Attorney for Appellant.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

Supreme Court of the United States.

OCTOBER TERM, 1890.

JAMES J. HILL, Appellant,

vs.

The Chicago and Evanston Railroad Company, The Chicago, Milwaukee and St. Paul Railway Company, The North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham, John J. Johnson, J. C. Easton, S. S. Merrill, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain, and George Smith.

APPELLANT'S ASSIGNMENTS OF ERROR AND BRIEF.

STATEMENT.

This case comes up on appeal by complainant from a decree entered in favor of defendants in the Circuit Court of the United States for the Northern District of Illinois.

The action was commenced by plaintiff in the Circuit Court of Cook County, State of Illinois, on the 17th day of November, 1882, for the purpose of enforcing a trust grow-

ing out of a contract, Exhibit "C," attached to the bill, and by which appellant became entitled to a transfer of a controlling interest of the capital stock of the Chicago and Evanston Railroad Company, and of a note or obligation of that company for $36,847.75, and of such sum of money as might be due from said Chicago and Evanston Railroad Company to defendant Goudy.

The contract was executed by A. B. Stickney in the name of A. B. Stickney & Co.

The complainant was the sole party in interest with Mr. Stickney, and before commencement of the action, by assignment, he acquired all the right and interest of Stickney in and under the contract. Fol. 681.

Upon petition of the defendants named in the original bill, the case was removed from the State court to the Circuit Court of the United States in February, 1883.

The parties to the original bill were the Chicago and Evanston Railroad Company, which issued the certificates of stock in suit, the North Chicago City Railway Company, which it is alleged had an equitable interest in said stock and note, William C. Goudy, as a party to the contract in question, and, together with Voluntine C. Turner, George Chandler, Samuel B. Chase and Ebenezer Buckingham, directors of the Chicago and Evanston Railway Company, John DeKoven, who held the stock and note in suit as trustee under the contract, J. C. Easton, D. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, S. S. Merrill, and the Chicago, Milwaukee and St. Paul Railway Company, charged with having entered into a collusive arrangement with the North Chicago City Railway Company and defendant Goudy and others, for the purpose of acquiring possession and control of the stock and note in suit and defrauding plaintiff and depriving him of his interest therein.

Shortly after the removal of the case into the United States Circuit Court complainant petitioned for an injunction order against the defendants upon the ground that they had entered or were about to enter upon the right of way of the Chicago and Evanston Railroad Company for construction purposes, to restrain them from continuing such work *or disregarding the prayer in the bill of complaint*, which prayed, as part of the relief sought, that the defendants be enjoined and restrained from transferring, assigning or disposing of said stock or note to any person or persons other than this complainant, and from permitting the defendants to vote said stock, from taking possession, control or management or in any manner interfering with the Chicago and Evanston Railroad, its franchises or property. Fol. 27, 58 and 59.

The hearing upon the motion for an injunction was by stipulation continued. Pending such hearing each of the defendants demurred to the complaint. Fol. 65–67.

In March, 1883, the complainant moved that the cause be remanded to the Circuit Court of Cook County. In June following an order was entered overruling the demurrers and the motion to remand. Fol. 69.

On the 10th of July, 1883, the cause came on for hearing upon the motion of the complainant for an *injunction according to the prayer of the bill*. The complainant stipulated in open court that he only asked for an injunction against the Chicago, Milwaukee and St. Paul Railway Company, the Chicago and Evanston Railroad Company, J. C. Easton, T. W. Wadsworth, S. S. Merrill, Edwin Walker, John J. Johnson and Elijah K. Hubbard.

The court having heard the motion, signified that the injunction would be allowed against such of said parties as

would not enter into a stipulation satisfactory to the court for the protection of the complainant.

The defendants, The Chicago and Evanston Railroad Company, Easton, Wadsworth, Walker, Merrill and Hubbard, filed a stipulation that they jointly and severally would obey and perform or cause to be obeyed and performed all the decrees or orders which might be rendered against them or any of them, and to pay and satisfy all sums which might be awarded complainant by reason of failure in such performance or by reason of any acts which might have been restrained if injunction had been issued and served, and that it was expressly understood that the right was reserved to the court to make such decree upon the final determination of the case as it might deem necessary to protect all the equities of the complainant. Fol. 71.

The court thereupon denied the motion for injunction against said defendants. An order was however entered that a writ issue according to the prayer of the bill against the Chicago, Milwaukee and St. Paul Railway Company, S. S. Merrill and John J. Johnson. Fol. 72.

Writ was issued and duly served. Fol. 75–76.

On October 1st, 1883, the last named defendants filed a disclaimer of any right, title or interest, legal or equitable in any of the matters set forth in the bill. Fol. 79.

Thereupon the defendant George Chandler filed a separate answer to the bill. Fol. 80.

Separate answer was also filed by the North Chicago City Railway Company. Fol. 85.

By the Chicago and Evanston Railroad Company. Fol. 126.

By John DeKoven. Fol. 135.

By William C. Goudy. Fol. 163.

Joint answer was filed by Voluntine C. Turner, (who was sued in the name of Volny C. Turner), Ebenezer Buckingham and Samuel B. Chase. Fol. 114.

And a separate joint answer by J. C. Easton, Edwin Walker, T. W. Wadsworth and Elijah K. Hubbard. Fol. 144.

It appearing by one or more of the answers that Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward and E. L. Frank, of the State of New York, William Rockefeller and Selah Chamberlain of the State of Ohio, and George Smith of London, England, had a pretended interest in the stock in suit, the original bill was amended by making each of them parties and the prayer of the bill was amended so as to include them in the relief sought. Fol. 193.

The parties defendant last named apeared and answered. Fol. 206.

Plaintiff replied to the answers of all the defendants. Fol. 218–225.

On the 27th day of October, 1884, the bill was further amended so as to show the pretended claim and interest of the defendants last named to the stock in suit. Fol. 228.

Subsequently the answers of the defendants were amended, and a general replication to the answer was allowed to stand. Fol. 233–239.

UNDISPUTED FACTS.

FIRST.

The Chicago and Evanston Railroad Company was incorporated by special act in 1861, and authorized to construct and operate a railroad from Chicago to Evanston. The capital stock was fixed by the charter at $100,000. It was increased in 1864 to $300,000, and decreased to $100,000 in 1877.

For some time prior to the 28th day of May, 1880, and on that day defendants Goudy, Volney C. Turner, Ebenezer Buckingham, Samuel B. Chase and George Chandler, were directors. Fol. 82 and 127.

All its capital stock was held by them in their own names, there being upon the books of the company no entry showing that they held it as trustees or in the interest of any other company or person. Fol. 165, 416.

The certificates of stock showed that no payments had been made. It was held subject to assessment.

The company had acquired but a small part of the necessary right of way. It had laid tracks on Hawthorne Avenue jointly with the Chicago and Pacific Railroad Company, and from the northern terminus of the tracks upon such avenue to the city limits. It had certain right in other tracks to be laid by the Chicago and Pacific Railroad Company on payment of one-half the cost.

Its proposed line in the city extended about two and one-half miles. From the city limits to Calvary Cemetery about seven miles. To the point in Evanston, which was the terminus, about two and one-half miles more. W. C. Goudy was its president. It had become indebted to the North

Chicago City Railway Company for moneys advanced by that company, which indebtedness stood in open account and amounted to $36,847.78.

SECOND.

COMMENCEMENT OF NEGOTIATIONS.

Mr. Goudy testified:

"Mr. Stickney came to my office in February, 1880, and made some inquiries about the Evanston franchise and property, and stated that he wished to know what its condition was and the legal rights, and if satisfied about it he and some other parties would like to make a negotiation for it and a purchase of it. I submitted the facts to him and made a statement in writing, which he submitted to Judge Beckweth. * * * This resulted in the making of a contract dated the 18th of February, 1880." Fol. 360.

Which in substance was as follows:

The Chicago and Evanston Railroad Company was to furnish its charter, ordinances, references to judicial proceedings affecting its title to right of way within the city of Chicago, and all facts touching its property, to Mr. Stickney for examination, &c. Stickney to furnish $20,000 if necessary, to be used in procuring such right of way. Stickney and his associates to complete and put in good running order a single track railway, &c., upon such right of way on or before the 1st of October, following. Stickney to pay to the president of the Chicago and Evanston Railroad Company $5,000 on signing the contract, $35,000 thereafter in monthly installments of $5,000 each, provided that when $15,000 of said sum had been paid, if the track was not

laid from the Chicago and Pacific depot to the city limits, further payments should be suspended until it was put down.

The railroad company agreed, "when the road shall be completed and the payments herein provided for shall be fully made, the Chicago and Evanston Railroad Company shall execute, issue and deliver its bonds to the said Stickney and his associates for the amount of money expended by them, or such less sum bearing 7 per cent interest as they may elect, or instead thereof, at least 880 of the 1000 shares of the stock of said corporation shall be transferred and assigned to said Stickney and his associates, and immediate control shall be given to them of the directory of said company, said Stickney and his associates to have the choice of modes."

The Chicago and Evanston Railroad Company was to have the right to fix not more than four stations for depots. The railroad company was also to furnish satisfactory evidence and security against any indebtedness of said company contracted by it, and when final contracts and agreements were made, 880 shares of its stock was to be transferred and assigned to a trustee to be chosen by it, to hold it in trust to be transferred to said Stickney and his associates, or in case of failure, to be reassigned to such persons as might be designated by the president of the company, that is, Mr. Goudy. Contract was signed Chicago and Evanston R. R. Co., by W. C. Goudy, Pres't.

Mr. Stickney subsequently, under an option reserved, withdrew from the contract. Fol. 447-451.

THIRD.

After Mr. Stickney had decided not to go on with the contract of Feb. 18th, he went to Chicago, and on April 13 had a interview with Mr. Goudy on the subject.

He then informed Mr. Goudy that he had not the pecuniary ability to build the road, but that there were persons back of him who had the means to do so, and arrangements were made by which, through the First National Bank of St. Paul, Mr. Goudy became satisfied of Mr. Stickney's ability to build the road and carry out such agreement as he might make. Fol. 360.

In May following, Mr. Stickney again went to Chicago, and taking the contract of Feb. 18th as a basis, drafts of three contracts were made, one of them between Mr. Goudy and the Evanston road, one between Stickney & Co. and the Evanston road, and one (under which the material questions herein arise) between Mr. Stickney and Mr. Goudy, all of them being executed by Mr. Stickney in the name of A. B. Stickney & Co.

The three contracts are to be construed as one contract, making in fact a tripartite agreement.

FOURTH.

CONCERNING CONTRACTS.

The contract between Mr. Goudy and the Chicago and Evanston road is Exhibit "A" attached to the bill.

This contract recites that the railroad company is desirous of obtaining the right of way for its line, from the

northern limits of the city of Chicago to Calvary Cemetery, in the town of Evanston.

Mr. Goudy agreed on his part:

1. To procure an adjustment of accounts between the Evanston Company and the Chicago and Pacific Railroad Company growing out of an existing contract between them in regard to the construction of tracks in the city of Chicago and the use of tracks jointly by them, and that if any sum was due on said adjustment, he would pay it, or release the Evanston company from all liability therefor.

2. That he would procure the right to connect the tracks of the Evanston Railroad Company with the tracks of the Chicago and Pacific company at the place fixed in the ordinance of the common council of the city for that purpose, and without expense to the Evanston company.

3. That he would procure or cause to be procured and vested in the Evanston company the right of way for its railroad from the northern limits of the city, "where the track of said company to be constructed in said city under the contract this day made with A. B. Stickney & Co. shall end, to Calvary Cemetery, upon such feasible and practicable lines as he might select for building the road." That he would procure permission to occupy streets, and that he would perform at his own expense, or procure the performance of all legal services necessary.

4. That if suit should be commenced before the tracks should be relaid and put in and repaired on Hawthorne and Southport avenues, or within three months thereafter, involving title to right of way, he would take charge of such suits and render professional services.

5. That he would procure an adjustment of accounts between the party of the first part and the Chicago and

Pacific Railroad Company, and authority, if any was required, to connect the tracks of the two companies at Hawthorne avenue, and the right of way, by the first of March, 1881. See fol. 39.

If in condemnation proceedings an appeal should be taken, it was provided that such appeal should not be a breach of the agreement, provided Mr. Goudy gave surety on an appeal bond, so that possession could be taken of the property.

6. In consideration of such agreement on the part of Mr. Goudy, the railroad company agreed to pay to him "twenty-five thousand dollars, upon the complete performance by him of the agreements on his part to be kept and performed."

Mr. Goudy was not to be held liable in any way for damages on account of a breach of the agreement on his part.

The contract provides:

"It is further understood and agreed by the parties hereto that if the said party of the second part (Mr. Goudy) fails to perform any of the stipulations and covenants herein stipulated to be performed, he shall not be liable for damages beyond the loss of the right to the compensation or the just share thereof agreed to be paid by the party of the first part."

This contract was signed, Chicago and Evanston Railway Company, by V. C. Turner, director, and George Chandler, secretary, and by Wm. C. Goudy. Fol. 39–612.

FIFTH.

Exhibit "B" attached to the bill is the contract between A. B. Stickney & Co., and the Chicago and Evanston Railroad Company.

By this contract Stickney and Company agreed:

1. To furnish all material except iron and other material which the Evanston company then owned, and construct and complete in a good substantial manner a single track railroad on the right of way then owned by the Evanston company on Hawthorne and Southport avenues, or which might thereafter be obtained by it, "*according to the contract bearing even date herewith, entered into between the Evanston Company and Wm. C. Goudy at its own proper cost and expense*, from its junction with the Chicago and Pacific Railroad Company to the south line of Calvary Cemetery in the town of Evanston, with side tracks, terminals, &c., for proper operation, within four months after the first day of March, 1881, provided that any delay caused by restraining orders or writs or overbearing force, the time of such delay should not be reckoned as a part of the four months."

It was further provided, that if, after the work of construction was commenced, it was not completed within the four months, a failure to complete it in four months should not work a forfeiture of the contract, but should be compensated in damages at the rate of twenty dollars per day for each and every day of delay over four months, &c., but not including delays occasioned by restraining orders, or overpowering force.

If the delay should continue for six months after the expiration of the four months, *the Evanston Company might declare the contract at an end, and the benefit of all work done,*

and material furnished should be retained as liquidated damages.

2. To keep a correct account of the cost and expense of the work and the material furnished, which, with an additional ten per cent, was to be the compensation to be paid by the Evanston company.

That for the purpose of construction, possession might be taken at any time of the right of way, including all right of the Evanston company on the line of the Chicago and Pacific company.

3. The Evanston company agreed that it would not during the continuance of the contract sell or incumber its property, or any part thereof, by lease, mortgage, trust deed or otherwise, without the consent of Stickney and Company first obtained in writing, and that it would not, without the consent of Stickney and Company alter, change or annul the contract into between it and W. C. Goudy, Exhibit "A." Fol. 42–617.

4. The contract provided that if the Evanston company should fail to perform any of the agreements to be performed by it, or if Stickney and Company should be prevented by final decision of the courts from laying or using any part of the track of said road, that said Stickney and Company might absolutely discontinue the performance of the agreement, unless the Evanston company should obtain a new right to use or lay said track or part of track, and that it should pay to Stickney and Company for the labor and materials already furnished, and damages suffered by them, for which a lien should attach to the property and franchises of the company.

SIXTH.

The contract between Mr. Goudy and A. B. Stickney & Co. is attached to the bill as Exhibit "E."

This is the contract mainly involved in the action.

By its terms Mr. Goudy agreed:

1. To perform contract, Exhibit "A" which was in terms made a part of this contract.

2. That he would upon the execution of the contract "cause to be properly assigned to John DeKoven, as a trustee, 875 shares of the capital stock of the Chicago and Evanston Railroad Company, to be held by him in trust for the purposes hereinafter specified, and also cause to be properly assigned to said John DeKoven, as trustee, a certain note bearing even date herewith, made by the Chicago and Evanston Railway Company to the North Chicago City Railway Company, for the sum of $36,847.78, payable in one year from date with eight per cent interest, to be held by him in trust for the purposes hereinafter specified; also cause to be assigned to said John DeKoven, as trustee his claim and right to the sum of twenty-five thousand dollars which shall become due to him said Wm. C. Goudy from the Chicago and Evanston Railway Company, upon completion of the contract before mentioned, which is hereto attached and marked Exhibit "A," to be held by him in trust for the purposes hereinafter specified.

3. To keep and save harmless the Evanston company, and Stickney and Company from all debts of said company existing, or which might be contracted "before the control of the corporation is transferred to party of the second part (Stickney and Company) as hereinafter provided, except

such note, and the indebtedness growing out of the contract marked Exhibit "A," and such indebtedness as might be created by the agency of Stickney and Company; that if suits should be commenced, involving title to the right of way in Hawthorne and Southport avenues, &c., "that he would render professional services to the Evanston company without other compensation than that provided in the agreement, Exhibit "A."

4. Stickney and Company, in consideration of the premises agreed to pay Mr. Goudy the sum of fifty-five thousand dollars in installments: twenty thousand at the signing of the contract; ten days after Mr. Goudy should have performed and completed all the agreements on his part contained in contract Exhibit "A," except the agreement in relation to professional services, the further sum of fifteen thousand dollars—written notice was to be given by Mr. Goudy of the completion; and sixty days after the fifteen thousand payment, the further sum of twenty thousand dollars.

5. That they would perform all the agreements on their part with the Evanston company, contained in contract Exhibit "B," for the construction of the railroad. A copy of Exhibit "B" was attached and made a part of this agreement.

6. That when the road was completed and transferred to them as provided in the contract, they would equip it and put it in operation.

7. *As to the Trust.* It was mutually agreed that the 875 shares of capital stock, the note for $36,000, and the sum of $25,000 provided for in contract Exhibit "A," which was

attached, should be held by the trustee until either Mr. Goudy or Stickney and Company should be entitled to possession of the same. That the deferred payments of $15,000 and $20,000 should be made to DeKoven, in trust for Mr. Goudy, to be paid him as he might direct.

8. *Consequences of breach of the agreement, on the part of Stickney and Company.*

The contract reads:

"If the second parties (Stickney & Co.) fail or neglect to make either of said payments as hereinbefore provided, the said first party (Goudy) may declare this contract ended, and all money paid and all rights under this contract shall be forfeited and may be kept by the first party as liquidated damages, and the said John DeKoven shall assign and transfer the shares of stock held by him to the party of the first part together with any money in his hand and thereafter all rights and interests of the second party in said contract or said note or the money to become due under contract Exhibit 'A' shall cease and be at an end."

If Stickney & Co. performed the contract and made payments as provided, the trustee was to transfer to them the stock and note and the money under contract Exhibit "A," and "the full control of the board of directors and the officers of said company shall be given to the parties of the second part until the full performance by the second parties of all the covenants on their part."

9. To insure performance, it was provided as follows:

"The first party and such persons as he may designate shall have the right to have the stock held by the trustee and to have five of the seven directors when it shall consist of seven, and if it consists of five then four of the five, the same

as if said shares had not been assigned by said trustee. It is the intention of the parties hereto to allow the party of the first part full control and possession of the property of the company as security of the performance of the agreement by the second party."

Mr. Goudy also had the right to locate four depots on the line of the road.

10. *Consequences of breach of the part of Mr. Goudy.*

"It is further understood and agreed that if default be made by the party of the first part in the performance of his agreement herein contained, so that the deferred payments of $15,000 and $20,000 shall not become due and payable under this contract, and such default shall continue for three months after the first day of March, 1881, then on the payment by said parties of the second part of the sum of $25,000 to said trustee for the use of said party of the first part in lieu of said deferred payments of $15,000 and $20,000, it shall be the duty of the trustee to assign said stock, and deliver said note, and the assignment of the claim of said party of the first part against the Evanston company in his hands to said party of the second part, and said party of the second part shall be entitled to recover from the first party such damages as they may sustain by reason of such default, not exceeding $35,000. But in case said second party shall neglect to pay said $25,000 within four months after the first day of March, 1881, the said DeKoven shall transfer said stock and deliver said note and assignment in his hand to the first party or his assigns."

The agreement was made binding upon the assigns of the respective parties and was executed by A. B. Stickney for himself and others, who authorized him to execute the same and furnish evidence of authority, &c. Fol. 29 to 35, 605.

SEVENTH.

At the time of the execution of the contracts the Evanston Company owned jointly with the Chicago & Pacific Railway Company about one and one half miles of track which had been laid in 1874 upon Hawthorne Avenue, and separately a track extending from such joint track to the city limits. This latter portion of the track had never been used for the running of trains and at the time the contracts were executed was unfit for use. The Evanston Company had no equipment and no tangible property except a rental which it received from the Chicago & Pacific Company for the use of such joint track.

Upon the execution of the contract, Stickney & Co. paid Mr. Goudy $20,000. At that time Mr. Goudy held certificate No. 25, for 568⅓ shares. (Fol. 573.)

Mr. Goudy testified:

"The first that was done was to procure a certificate for 875 shares of stock, which was issued, certificate No. 27, dated May 28th, 1880, to John DeKoven, trustee. The way in which that certificate was made up was this: The share of stock stood on the books in my own name, in J. C. Turner's name, and in Ebenezer Buckingham's, and there was a small number of shares in one or two other persons. These certificates were surrendered and a new certificate was issued representing the amount so surrendered, to DeKoven."

Fol. 370.

Mr. Goudy was asked:

Q. Was it in your name absolutely in the certificate and on the books? A. Yes, sir, that is, they did not have the word "trustee."

Q. So far as it appeared from the records of the company, it stood absolutely in your name? A. Yes, sir.

Fol. 416.

Then the indebtedness of the Evanston Company to the North Chicago Company standing in open account was put in the form of a note. As to this Mr. Goudy testified:

"I also prepared and made an assignment to John DeKoven, as trustee, of all my interest in a contract of that date for procuring right of way, and these three documents were left with Mr. DeKoven on the day of the date."

Fol. 470.

Two vacancies in the board of directors, there being seven in number, were filled by selection of John W. Ela and Thomas Parker, as representatives in the board of the interests of Stickney & Co.

Mr. Goudy settled the accounts between the Evanston Company and Chicago and Pacific Company on the 6th day of July, 1880.

Fols. 370–371.

He also made some investigation as to the location of the line, cost of acquiring the right of way, etc., but did not obtain the right of way or perform the contract on his part.

Time for performance was extended.

Mr. Stickney testified:

"I find by reference to a diary that I kept at that time, that I arrived in Chicago at 8 o'clock in the morning of February 21st, 1881, from New York, and that I left on the 23rd. During that time I was in Chicago I called upon Mr. Goudy and asked him how he was getting along in regard to this right of way. He replied that he had not met with the success he had expected and did not know as he would be able to have it all completed at the time the contract called

for, and asked me if I would make him any trouble in case he failed. I told him, no, that we should not make any point on the question of time if he did not. He said it would be impossible to complete his contract by the first of March; that he would want an extension of time. I told him that was all right; he could have any reasonable time he required for that; that we did not want to make it any more burdonsome than necessary. I called upon Mr. Goudy on the 13th of April of the same year and he still asked for further time and it was granted him."

Fol. 657.

Mr. Goudy qualified this part of Mr. Stickney's testimony. He denies that an extension was granted at his request, but admits telegrams and letters which show conclusively that it was extended by mutual consent and acquiescence of Mr. Goudy, Mr. Stickney, the Evanston Company and the North Chicago City Company.

The evidence will be referred to in detail in discussing the points in dispute concerning the extension of time. It is sufficient for the purposes of this statement to refer to one or two letters and telegrams.

On January 3d, 1881, Mr. Stickney wrote to Mr. Goudy and Chandler as follows:

"About ten days ago I wrote Mr. Goudy, requesting information as to how far he had progressed in getting the right of way, etc., of the Chicago and Evanston Company. Not having heard anything in reply, I presume the letter miscarried. Please give me desired information at earliest convenience."

Fol. 458.

In January Mr. Goudy telegraphed to Mr. Stickney as follows:

"Mr. A. B. Stickney: Yours of 26th ult. is received. I expect to get right of way by first of March, and have no unexpected obstacles."

He did not obtain right of way by the first of March, and had done nothing of any consequence in a direction of obtaining it.

Mr. Stickney testified that in an interview in April Mr. Goudy asked for further time, which was granted.

Fol. 657.

On May second Mr. Goudy wrote Mr. Stickney, which contains this statement:

"We are getting along quite well with the right of way, and expect to complete the most important matters this week."

Mr. Stickney, on August 26th, 1881, telegraphed to Mr. Goudy as follows:

"Have you got the right of way matters all settled so I can go to work on construction at once? Answer."

Fol. 459.

Mr. Goudy replied the next day as follows:

"Some proceedings pending to be tried within twenty days, and think no work should be commenced before that time."

Two days later Mr. Stickney replied as follows:

"No objection to your taking more time to secure right of way, but in that case you must not expect us to commence work until next spring."

On September first Mr. Goudy wrote Mr. Stickney the letter containing the following statement:

"On receipt of your last dispatch I was about to answer that I had time for completion fixed in the grants for right of way July first, 1882, but that I thought the track in the

city ought to be laid this fall, so if there was any delay by injunction the entire work would not be delayed beyond July next."

Mr. Goudy testified:

"About first of June (1881) I went to work again to procure right of way, and spent a large portion of my time about it from that time up to the first of June; made arrangements for a considerable part of the right of way. Many of these arrangements were in parole, and for one reason and another the deeds for the right of way were not actually executed, but in other cases they were. The first of June came around, and I did not have the right of way procured. I continued to work for a considerable time during June up to the first of July, with a like result. So much I did by way of performing under the contract, up to the time a default was made, as I understand it, by Stickney, under the contract, in not paying twenty-five thousand dollars."

Fol. 373.

"Question. When, with reference to Lowr[illegible] did you cease all attempts to get the right of way? Answer. I did not cease all attempts to get the right of way at that time, and never did until I made the contract with Easton and Carey.

"Q. Were you engaged in efforts to obtain right of way during all the year 1881, at intervals? A. Yes, sir."

Fol. 417.

Thus matters continued during the year 1881.

About the first of January, 1882, Mr. Hill, representing Stickney and Company, met Mr. Merrill, of the Chicago, Milwaukee and St. Paul road, and told him the situation in regard to the stock of the Evanston Comoany and the contract. Mr. Merrill thought that that company would like to acquire the property and control of the Evanston Com-

pany, and asked Mr. Hill to send him a statement of what was covered by the contract of Mr. Goudy.

Fol. 665.

Thereafter Mr. Hill procured a statement from Mr. Stickney, under date of February 4th, 1882, showing interest of Stickney & Co. in the contract, etc., which he sent to Mr. Merrill with a letter on February 6th.

Fols. 683, 684.

Mr. Goudy, claiming to have heard of this interview, and that Mr. Hill had offered to transfer the interest of Stickney & Co. in the contract to Mr. Merrill for $75,000, without any notice to Stickney & Co., entered into negotiations with the Milwaukee Company and with others, for the purpose of making a transfer of the stock and note still remaining in the hands of DeKoven.

Mr. Stickney, understanding the contract was still in force, and not having received any notice that Mr. Goudy claimed otherwise, in May, 1882, offered to transfer his interest to Mr. Lowry, and Mr. Lowry called upon Mr. Goudy in reference to the matter.

As to this, Mr. Goudy testified:

"Lowry called on me on the 4th of May, 1882. Stated he had been sent there by Mr. Stickney, and he had with him at the same time the duplicate original contract of Stickney of the 28th of May, 1880. That Stickney had offered to sell him contract at $75,000, or twenty more than I was to receive, and he wished before concluding any arrangements, to ascertain the situation of the property, and the rights under the contract. I informed Mr. Lowry at that time Mr. Stickney had nothing to sell. That the contract had been ended long ago by default on his part."

Fol. 364.

Mr. Lowry thereupon, on May 4th, 1882, telegraphed to Mr. Stickney as follows:

"Goudy says contract expired. Not now in condition to renew. May be soon, but new contract on different terms must be made."

Folio 678.

Mr. Stickney, on May 29th, wrote Mr. Goudy:

"I am in receipt of letter and telegram saying that you claim I have forfeited my rights in the Chicago and Evanston Railway. I am very much surprised at the information, as all the delay has been entirely at your request, both verbal and in writing. Your letters and telegrams I have. I think I am entitled to some explanation. I would like to hear from you."

Mr. Goudy replied to this letter on June 5th, as follows:

"Your letter of 29th ult. has been received. I regret that you did not let me know of your being in Chicago the time before the date of your letter. I called at Pacific Hotel to see you, but found that you had then left. The contract was made by me as one party, and by you and certain other parties as the other party. I learned sometime ago from reliable source that your associates had abandoned all idea of proceeding with the execution of the contract, which by its terms has expired, and your failure to come to Chicago, as proposed, or to pay any further attention to the matter, confirmed the information. As yet I have not made any arrangements with other parties."

Fol. 461.

EIGHTH.

CLAIM OF NORTH CHICAGO CITY RAILWAY CO.

Mr. Voluntine C. Turner who was director of the Evanston Company and stockholder of the North Chicago City Railway Company, testified that the North Chicago City Railway Company was the owner of all the stock of the Evanston company. That it did not stand in the name of the North Chicago City Railway Company, but was held in trust generally by the board of directors of the North Chicago City Railway Company. That such directors did not have an individual or personal interest in it.

Fols. 534–535.

That the North Chicago City Railway Company made sale of the stock of the Evanston Company to Goudy in the spring of 1880, and that Mr. Goudy was not acting as an agent of the Chicago Company but for himself in selling the stock and entering into the agreement with Stickney and Company.

Fol. 535.

The stock stood in the name of Mr. Goudy and others on the books of the company.

Mr. Turner testifies that as director of the North Chicago City Railway Company he had sold all the interest of that company in that stock to Mr. Goudy, and that "it was transferred to him as a purchaser, bona fide sale."

Fol. 537.

That Goudy never was entitled at any time to the possession and control of the franchises of the Evanston Company or its property without first paying the amount of the purchase price which he agreed to pay.

Fol. 542.

As evidence of the agreement between the North Chicago City Railway Company and Goudy concerning the stock, a written contract was produced and attached to the deposition of Mr. Goudy, as Exhibit "14." This contract was executed on the 28th day of May, 1880, by the North Chicago City Railway Company, by V. C. Turner, president, Hiram Crawford, secretary, and William C. Goudy.

By its terms:—

1. The railway company agreed to sell and assign to Mr. Goudy "all the interest it had in the shares of the capital stock of the Chicago and Evanston Railroad Company, being about 890 shares, and the promissory note of the Evanston company payable to the party of the first part, for $36,847.78 without recourse."

2. Mr. Goudy agreed to pay therefor $25,000.

3. It was mutually agreed that the stock should be assigned to John DeKoven as trustee, and the stock and note should be delivered to John DeKoven as trustee, "to hold the same until the said sum of $25,000 shall have been paid to said trustee under a contract of even date herewith between A. B. Stickney & Co. and the party of the second part, or until there shall be default in the payment of the sum of $15,000 and $20,000, or $25,000 as therein provided."

4. It was further mutually agreed that there should be paid out of the $15,000 to the railway company $12,500, and out of the $20,000, $12,500—making $25,000, and in case such deferred payments were not made, that then the sum of $25,000 to be paid by Stickney and Company to the trustee, should be by him paid to said railway company, and that when paid to said railway company "all its interest in said stock shall cease."

5. *In case of default.* If the $25,000 was not paid as aforesaid, then the shares of stock and evidence of indebted-

ness should be assigned and delivered by the trustee to the railway company and such parties as it might designate. The contract between Stickney and Company and Mr. Goudy, which had been deposited with DeKoven, was referred to for certainty.

6. It was provided that this agreement "shall be an order on the trustee to pay the sum of $25,000 as aforesaid to the railway company, and in case of default, to assign the stock and note to the railway company."

Mr. Goudy testified:

"That he kept a copy of this contract, and that Mr. Turner kept a copy, but none was left with Mr. DeKoven."

Fol. 367.

"And he knew nothing about the matter except what Stickney and I told him," and there is no claim that the contract between the North Chicago Company and Goudy was brought to his knowledge.

Fol. 367.

Mr. Goudy further testified:

"The sale was made to me, but my ability to pay for it depended upon selling it to some one else. I did not act as agent or attorney of the North Chicago Company. The sale was made to me, but so far as the payments were concerned it was understood I had no means to pay for it, unless I could make a sale to some one else, and the payment was deferred until I could accomplish that. They insisted they would not deliver it to me, and I would not get it until I paid for it. It was not to be a consummated transaction until I paid for it."

Fol. 437.

NINTH.

Mr. Goudy, in the absence of Mr. DeKoven, applied to the president of the Merchants National Bank for the certificate, note, etc., but did not get them. In New York in May, 1882, he applied to Mr. DeKoven personally for the surrender of the documents and DeKoven postponed delivery until he reached Chicago. On reaching Chicago, Mr. DeKoven was advised by attorneys to whom he submitted the matter that he should surrender them to Mr. Goudy or order.

Fols. 389–390.

In the meantime DeKoven told Mr. Turner that Mr. Goudy had applied for delivery of the certificate and the note. Mr. Turner then served a written notice on DeKoven not to deliver them to Mr. Goudy, and demanded them himself, and then gave him a copy of the contract between the North Chicago City Railway Company and Goudy, and thereupon, on the thirteenth day of June, 1882, DeKoven delivered the certificate and the note to Mr. Turner.

Fols. 390–391.

Mr. Turner took the certificate to the secretary of the company for cancellation, and a new certificate was issued to his name on June 16th, 1882.

Fol. 539.

TENTH.

Mr. Goudy claims that in the first part of July, 1882, he made a new arrangement with the North Chicago City Railway Company through its president, Mr. Turner.

There was no new contract, but simply a verbal agreement that the time for payment for the stock and note should be extended to September 5th, 1882.

The North Chicago City Railway Company and Mr. Turner, its president, had, as we have seen, with knowledge of the trust, obtained a delivery of the certificate of stock held by DeKoven, as trustee, to Mr. Turner.

On the 8th day of August, while the stock and note were in the possession of Mr. Turner as trustee for the North Chicago City Railway Company, Mr. Goudy entered into a written agreement with Easton and Carey to transfer to them, not stock held by himself or any particular person, but to cause to be transferred 889 shares of the capital stock of the Evanston Company.

The contract provides as follows:

1. Goudy is to cause 889 shares of stock of the Evanston Company to be transferred, and to procure the resignation of directors so that vacancies may be filled by such person as Easton and Carey may designate.

2. To procure and cause to be transferred the stock held by A. B. Stickney, or in default thereof $1,000 to be deducted from the purchase price.

3. To render service in procuring right of way between Fullerton Avenue and Calvary Cemetery, as might be requested by Easton and Carey, for a reasonable compensation.

4. Upon the transfer of stock and the procuring a change of directors, Easton and Carey agreed to pay Goudy $50,000.

5. In further consideration they agreed to construct and put in operation the railway of the Evanston Company.

6. The stock was to be transferred and the change of directors to be made on or before the 5th of September.

7. The debts of the Evanston Company are to be paid by Goudy and it released therefrom, and upon the further payment of $30,000 he agreed to complete the right of way from the city limits to Calvary Cemetery.

Fols. 530, 531.

This contract is in all material respects identical with the contract between Goudy and Stickney. For the stock and note Goudy is to receive $50,000 instead of $55,000, as in the agreement with Stickney, and for procuring right of way is to receive $30,000 instead of $25,000, as named in his contract with the Evanston Company.

Mr. Goudy testified that the stock was at that time owned by the North Chicago City Railway Company; that Turner had no individual interest in it.

Fol. 437.

To same effect see Mr. Turner. Fol. 535.

It was delivered by DeKoven to Turner pursuant to his written request as president of the North Chicago City Railway Company.

Fol. 551.

Neither Easton or Carey saw the certificate of stock. They relied solely upon the promise of Goudy to cause a transfer of the stock, and not upon any statement or assurance appearing upon the face of the stock or upon the stock ledger, or otherwise, as to its ownership.

On the 19th day of August Turner, for the North Chicago City Railway Company, placed the certificate of stock standing in his name as trustee for the company, and the note, in

an envelope, upon which he made this endorsement: "This envelope with its contents is to be delivered to Edwin Walker or W. C. Goudy upon payment of $25,000 on or before September 5th, 1882, and in case of failure in making such payment this envelope and contents to be returned to me."

This envelope with its contents was deposited in the Commercial National Bank to be held until the amount named was paid.

Fols. 392, 393.

Afterwards Mr. Easton gave a check on the Commercial National Bank that was certified, payable to Turner, for $25,000, and at the same time another check, not certified, to Mr. Goudy for $10,000.

Afterwards Mr. Turner procured his deposit in escrow from the bank by consent of the parties named in it.

Mr. Goudy then prepared a certificate for 875 shares, No. 37, to J. C. Easton, and placed that certificate with the note in another envelope, leaving it in escrow at the Commercial National Bank, to be delivered to Mr. Easton on his paying the $25,000 for Mr. Turner, and the further sum of $19,000 for himself, and on the 5th of September the certificate was handed over to Easton, it being intended to cover the same shares in the certificate in Mr. Turner's name.

Mr. Goudy testified that the transfer was not made to Easton until the 5th of September.

Fol. 432.

Thus it appears that the certificate of stock held in the name of Turner for the North Chicago City Railway Company was never assigned or transferred to Easton and Carey. They never acquired any right or interest in it. They did not purchase it, but relied solely upon the promise and assurance of Mr. Goudy that he would cause to be transferred

to them 889 shares of the stock. They did not know except from books of the company in whose name the stock stood.

On the 24th of August after the check had been deposited in the bank by Mr. Easton, Mr. Goudy endorsed on the bottom of the same envelope these words: "The delivery is to be made upon the payment aforesaid to Edwin Walker or J. C. Easton. Signed, W. C. Goudy."

Fol. 393.

ELEVENTH.

Mr. Walker knew as early as February, 1882, that the complainant claimed an interest in the stock and the control of the Evanston Company. He had been informed of the negotiations between Mr. Hill and Mr. Merrill in reference to the transfer of the stock and the control of the Evanston Company to Mr. Merrill.

Fol. 472.

Mr. Easton testified as follows:

"On the start I supposed he (Goudy) was the sole owner of the control of it (the stock of the Evanston Company). When he explained the position of the thing he said, I think 875 shares, most of the stock, was held by the North Chicago City Railway Company, or V. C. Turner, as security for a note of nearly $40,000 and interest, but on payment of this to Mr. Turner he would transfer the stock to me or to us, and payment was made to Mr. Turner and he transferred I think 875 shares, 110 shares remaining with Stickney and

some four or five shares with Ela, and the rest of it we got at that time."

Fol. 509.

Thus it appears that Mr. Easton was informed that neither the North Chicago City Railway Company or Turner as its president had the legal title to the stock of the Evanston Company. That the interest the North Chicago City Railway Company had in the stock was simply a claim or equity upon it as security for the indebtedness of the Evanston Company to it.

Before the contract was concluded with Mr. Goudy, Easton and Carey had consulted with Mr. Walker in reference to the subject of the purchase.

Easton testified:

"I do not recollect whether Mr. Walker explained that he had any talk with Goudy. I presume he went on to say, that there was this Chicago and Evanston corporation, that Mr. Goudy owned it or controlled it and that he thought we could purchase it, and I think he made an appointment with Mr. Goudy to meet us there. We met Mr. Goudy and he promised to sell it to us. Mr. Walker explained the value of the enterprise and also about the franchises."

Fol. 507.

Further, "That the minutes showed what had been done by the Evanston Company since its organization; that Mr. Carey examined the minutes, and that he relied upon Mr. Carey's examination of the records of the Evanston Company."

Fols. 514–525.

Mr. Walker testified that he was consulted in a friendly way both by Easton and Carey about it, but was scarcely attorney of either of these gentlemen at that time; that he had made an examination of the records of the Chicago and

Evanston Company; that Carey also made an examination; that he communicated to Mr. Easton only important information in reference to the matter which he had obtained.

Fol. 348.

Mr. Goudy testified:

"In some of the interviews had preliminary to the contract with Easton and Carey, or at the time it was made, there was some conversation about the contract with Stickney. There is a provision in the contract of Easton and Carey about a certificate of shares of stock that was held by Stickney, and in connection with that fact and the proposed efforts to get up the stock there was a statement made by me that there had been a contract with Stickney which had expired by its terms, and that I doubted whether I could get the certificate from Stickney, because he was claiming some money under the old contract which had expired. I refer to the contract between myself and Stickney of May 28, 1880, which was the only one I ever had with him."

Fol. 445.

As to the stock certificates Mr. Goudy testified:

"The fact was that the stock had been originally subscribed by individuals and no money paid. The form which is contained in exhibit to Hill's deposition, of the certificate, was issued from time to time to the persons in whose names stock apparently stood. Those certificates on their face stated that no payments had been made, and upon payment the parties would be entitled to a certificate of stock. Those were the only certificates issued when I had any connection with the road in September, 1882, and no money down to that time had been paid on the stock."

TWELFTH.

A meeting of the board of directors of the Evanston Company was held on the 4th and 5th of September, at which Mr. Goudy, Turner, Chase and Chandler were present. Buckingham, Ela and Parker did not attend. At this meeting an assessment was voted.

On the 5th of September, Mr. Goudy and the other directors, five in number, resigned.

Fol. 395.

Edwin Walker, J. C. Easton, S. S. Merrill, Tertius W. Wadsworth and Elijah K. Hubbard were elected directors to fill the vacancies. J. C. Easton was elected president and Tertius W. Wadsworth, secretary.

Fol. 103.

All of these persons accepted their respective positions except S. S. Merrill.

When Easton was elected director he held a certificate in the form above mentioned for 875 shares, Stickney held 110⅔ shares, and the balance was held by different persons, Mr. Goudy still holding 10 or 12 shares.

Fol. 427.

Mr. Goudy had purchased of Mr. Haskins 110⅔ shares and transferred the same to Mr. Stickney in July, 1880.

Fol. 380.

A call was made for the payment in full of the assessments on or about the 15th day of September, following. Mr. Stickney, Ela and Parker were not present at the meeting. The evidence shows that notices were mailed but not received.

At a meeting held on the 20th of September, 1882, at which Easton, Hubbard and Walker were present, Ela,

Merrill and Parker being absent, the capital stock held by Stickney, Ela and Parker was declared to be forfeited and the president and secretary were authorized to sell the stock represented by such certificates at par value, and to issue new certificates therefor.

Fol. 603.

THIRTEENTH.

Mr. Easton claimed that in making the purchase he and Mr. Carey did not act for themselves, but that they represented the defendants George Chandler, Julius Wadsworth, Hugh T. Dickey, James T. Woodward, Selah Chamberlain, William Rockefeller, James Stillman, J. Milbank, E. L. Frank and George Smith.

Fol. 155.

In their answer to the amended bill the parties named admitted that they were stockholders of the Evanston Company, and they adopted the general answer of Easton, Walker, Wadsworth and Hubbard.

Fol. 206.

WHAT LED EASTON TO MAKE THE PURCHASE.

He testified:

"A short time before the contract was made I came to Chicago with Mr. Carey and met Mr. Goudy and negotiated for the purchase of the control of the Chicago and Evanston stock. I had never seen Mr. Goudy before." Fol. 498.

"My attention was first brought to the fact that Mr. Goudy wanted to sell the stock by Mr. Wadsworth, of New

York, who was at that time vice president of the Milwaukee and St. Paul road. He stated that he thought it was a valuable franchise or could be made so, as it was not easy to get into Chicago, and that it could be purchased and the title good. I called on Mr. Carey as a friend and attorney and offered him some stock, which he refused to take, but said he would assist me in making the negotiations." Fol. 504–505.

"At the time I was a stockholder to a considerable extent in the Milwaukee road." Fol. 505.

"I knew there was a connection between this track and the union depot with the Chicago and Pacific road, which was under the control of the Milwaukee and St. Paul, and that the connection between the Chicago and Evanston would be with the Milwaukee and St. Paul, and that it would be for the interest of that company to have control of this road." Fol. 508.

"I put in all the money at that time because I did not want to call on parties in New York." Fol. 511.

"Mr. Walker made a statement of what he thought to be the value of the road, and I relied very largely upon Mr. Wadsworth's recommendation." Fol. 514.

"I knew of the value of this road in friendly hands to the Milwaukee and St. Paul. That might have been one of the objects in purchasing it." Fol. 516.

"At that time the road was constructed to the city limits but had long been disused up Southport Avenue, and the track was covered with dirt, and some of it was not there. We had to reconstruct it in Southport Avenue." Fol. 501.

"This was done by a train and employes of the Milwaukee Company. Mr. Easton claims, however, that the Evanston Company paid for the service." Fols. 502, 513.

The road, as we have seen, extended only seven miles from the city limits.

Before October 1st something had been done towards repairing and reconstructing the track in Southport Avenue, but the road had not been completed and no connection had been secured with the union depot at the time of the trial.

Fol. 569.

STATE OF THE CASE AT THE TIME THE ACTION WAS COMMENCED.

Mr. Easton held a certificate for 875 shares of stock in his own name, but in trust for other parties named by him and for whom he purchased.

The assessment made upon such stock was paid by Easton on or shortly after the 20th of September, 1882.

At the time of the commencement of the action the certificate for 875 shares, or a controlling interest in the stock, was held by Easton.

The stock also stood in his name when the stipulation was signed by himself and others by which they agreed to abide by the order of the court, and upon which stipulation injunction was denied.

Fol. 71.

It is stated in the answer of Easton that he surrendered the certificate of stock held in his name and that new certificates were issued to parties for whom he purchased. The case does not show the date when such transfer was made.

Defendants Goudy, Chandler, Chase and Buckingham had been directors of the Evanston Company, and were still directors of that company if Easton acquired no interest in the stock and had no right to vote it at the meeting on September 4th and 5th, when the old directors resigned and new directors were chosen.

The Chicago, Milwaukee and St. Paul Company had performed certain work of construction on the Evanston line.

Walker and Carey were in its service as attorneys, and were made parties with the Milwaukee Company on the ground, as claimed, that they were parties to a collusive proceeding to deprive complainant of his interest in the stock.

FOURTEENTH.

The action was commenced November 17, 1882.

The bill of complaint sets out the contracts executed on the 28th of May, 1880. It then alleges the payment of $20,000. That Goudy did not perform and complete the agreement by him to be performed. That he never gave any notice of performance as provided by the contract. That the deferred payments never became due and payable because no default had occurred on the part of Goudy in the performance of said agreement, the time of performance having been extended by mutual consent. (Fols. 17, 18, 19.) That Goudy had the controlling interest and right to dispose of the stock. (Fol. 5.) That the other defendants knew of the right and interest of Stickney & Co. in and to the stock and note, and that the proceedings on their part were secret and collusive. That no interest was acquired by them in the stock. That Turner and Easton had knowledge of Stickney's rights. That they acquired no legal title to the stock transferred by DeKoven, and that they held and now hold the stock subject to the right and interest of complainant therein, and that upon payment of $25,000, which was tendered in the bill, (fol. 26,) the prayer of the bill should be granted.

The prayer for relief is as follows:

"Said pretended transfer of said stock and note and claim to said Turner, Easton, Walker, Merrill, Wadsworth, Hub-

bard and Johnson, and said pretended election of said Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill as directors, and of said Easton as president, and of said Wadsworth as secretary and treasurer of said Chicago and Evanston Railroad Company, and all forfeitures and all proceedings for forfeiture of said 875 shares or said 110⅔ shares of said stock be set aside and declared null and void by the court, and that the defendants Turner, Wadsworth, Easton, Walker, Hubbard, Merrill and Johnson, Dickey, Milbank, Stillman, Wadsworth, E. L. Frank, Rockefeller and Selah Chamberlain, be decreed to deliver and transfer and assign the said 875 shares of said stock and said note and said claim and the control of said Chicago and Evanston Railroad Company to your orator, and that said other defendants cause the same to be done so far as they have the control thereof, and that the defendant the Chicago and Evanston Railroad Company do register and cause to be transferred said stock on the books of said company to your orator, in accordance with the charter and by-laws of said company, and that said increase of said capital stock be set aside by the court and be decreed to be null and void, and that said new or increased stock and all certificates therefor be decreed to be annulled and cancelled and held for naught, and that said new or increased stock and the certificates therefor be delivered to your orator, or new certificates therefor be decreed to be issued to your orator, and that the title of your orator in and to said property be quieted, and that the defendants be perpetually enjoined and restrained from transferring, assigning or disposing of said 875 shares of stock or any stock issued in place thereof, or said 110⅔ shares of stock, or said pretended new or increased stock, or promissory note or claim, to any person or persons other than complainant, and from voting on or otherwise using

said stock, and from permitting said Turner or said Easton, Wadsworth, Walker, Hubbard, Johnson, Merrill, Dickey, Milbank, Stillman, Wadsworth, Frank, Rockefeller, Chamberlain and Smith, or any other person than your orator to hold the stock, or from recognizing the said Turner, etc., or other persons than your orator as the owner or holder thereof, and from taking any possession, control, management of or in any wise interfering with said Chicago and Evanston Railroad Company, or its railroad or its franchises, or any of its property, rights, interests or privileges, and that in the meantime a temporary injunction issue during the pendency of this action so restraining and enjoining said defendants, and that your orator may have such other and further relief as the nature of the case or as equity may require, and as to your honor may seem meet."

(See original bill, fols. 26, 27; amended bill, fols. 193, 228, 230.)

FIFTEENTH.

VIEW OF TRIAL COURT.

The case came on for hearing at the June term, 1885, before Justice Harlan, who decided that the suit must be dismissed as to the defendants DeKoven, Turner, Chandler, Goudy, the North Chicago City Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, for want of equity. That the North Chicago City Railway Company owned the stock and note in question, and that it sold the same to Goudy and by failing to pay for it on or before

the first of July, 1881, all right on his part and those claiming under him ceased.

Fols. 245 to 248.

A decree was thereupon entered, on the 8th day of June, 1885, in substance as follows:

"This case coming on for final hearing upon the pleadings, depositions, and documentary evidence produced before the court, it is ordered and decreed that the complainant's bill be dismissed for want of equity as against the defendants William C. Goudy, V. C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and the Chicago, Milwaukee and St. Paul Railway Company, with their costs, to be taxed by the clerk. That so much of the complainant's bill as relates to 110⅝ shares of stock issued to Stickney be dismissed for want of equity, and that all relief be denied to the complainant upon all matters and things in controversy, 'except as to the amount of money paid by the defendant Goudy for right of way in execution of the contract between him and Stickney & Co. of May 28th, 1880,' and for the purpose of ascertaining said amount it is ordered, that this cause be retained as to the other defendants, and that it be and is hereby referred to Henry W. Bishop, a master, to take, approve and make report of the amount so paid, and that upon the making of said report, such further decree will be entered as may be equitable."

The record further reads as follows:

"Thereupon the complainant prays an appeal to the Supreme Court, which is allowed upon his filing a bond in the penal sum of $500, with provisions required by law, and with security to be approved by the court."

Fols. 257, 258.

Afterwards, on the 29th of January, 1887, Mr. Bishop, the referee, made report that Mr. Goudy had paid for right of way in execution of the contract between him and Stickney & Co. $6,513.

Fol. 260.

Exceptions were filed to the report by the Evanston Company and also by complainant.

Fols. 310, 312.

Exception came on for hearing, before Justice Harlan, and final decree was entered on the 14th day of July, 1887.

The decree, as entitled, is against all of the defendants. It reads:

"This cause came on to be further heard at this term, and was argued by counsel, and thereupon, and upon consideration thereof, it is ordered and decreed as follows:"

The exceptions to the report of the referee were overruled, and the Evanston Company decreed to forthwith pay to the complainant $6,513, with interest, costs, etc.

It was further ordered and decreed that the other relief prayed for should be denied against the defendant, the Evanston Company, and that the bill be dismissed as to the defendants Wadsworth, Walker, Hubbard, Easton, Julius Wadsworth, Dickey, Milbank, Stillman, Woodward, Frank, Rockefeller, Chamberlain and Smith.

Fols. 315, 316.

Thereupon the complainant prayed an appeal to the Supreme Court, which was allowed. Appeal bond was filed and approved the 11th day of August, 1887.

The condition of the bond relates to the last decree, that is, the one of July, 1887.

Fol. 698.

ASSIGNMENTS OF ERROR.

First. The court erred in deciding that the North Chicago City Railway Company was authorized and empowered under its charter to acquire the legal title to the stock of the Chicago and Evanston Company, or hold and dispose of the same.

Second. The court erred in deciding that the North Chicago City Railway Company held the title to the stock, and that it conveyed such title to Mr. Goudy.

Third. The court erred in not deciding that the North Chicago City Railway Company had no interest in the stock of the Evanston Company other than such interest as would arise from an understanding that the indebtedness of the Evanston Company to it should be paid out of the proceeds received from a sale of the stock.

Fourth. The court erred in not deciding that the legal title to the stock was in Mr. Goudy, Mr. Turner, Mr. Buckingham and Mr. Chase and others who held certificates and in whose name the stock stood upon the books of the Evanston Company at the time of the surrender of the certificates and the issue of a new certificate to Mr. DeKoven as trustee, and in not deciding that such holders of the stock had authority to transfer the same without the consent of the North Chicago City Railway Company, subject only to such equity as that company had in it and which was known to the purchaser at the time of the transfer.

Fifth. The court erred in not deciding that the time for performance of the contract and for obtaining the right of way by Mr. Goudy had been extended at his request and by

mutual consent, so that in fact there was no default on his part in not obtaining the right of way for the Evanston Company.

Sixth. The court erred in not deciding that the North Chicago City Railway Company and V. C. Turner had knowledge of the extension of the time of performance by Mr. Goudy, and acquiesced therein, and in not holding that it was bound by the acts of Mr. Goudy, and estopped from denying his authority to agree upon an extension.

Seventh. The court erred in not deciding that the North Chicago City Railway Company obtained the transfer of the certificate from DeKoven wrongfully and with knowledge of the right and interest of Stickney and Company therein, and in not deciding that the certificate of stock issued to V. C. Turner, trustee for said company, was held by him or the North Chicago City Railway Company, subject to the interest of complainant and to the trust and obligation of DeKoven.

Eighth. The court erred in not deciding that Stickney and Carey had, or were chargeable with, knowledge of the contract between Stickney and Goudy and that DeKoven held the certificate of stock standing in his own name as trustee; and in not holding that they had knowledge of or were chargeable with knowledge of the character of the trust, and that the trust was subsisting at the time they made the contract with Goudy, and that DeKoven had no right to transfer the stock to V. C. Turner for the North Chicago City Railway Company.

Ninth. The court erred in not deciding that the pretended purchase was made by Easton and Carey in the interest of the Chicago, Milwaukee and St. Paul Railway Company, with a knowledge of complainant's rights and

with an intent on their part to defraud Stickney and Company and prevent their obtaining the stock of the Evanston Company and the control of that company.

Tenth. The court erred in not deciding that Easton and Carey held the stock charged with the obligations of the trust and subject to the performance of the obligations of DeKoven.

Eleventh. The court erred in dismissing the bill as to the defendants named in the decree for want of equity.

Twelfth. The court erred in not deciding that complainant was entitled to a transfer of the certificate of stock standing in the name of Easton, or those for whom he purchased, or to a transfer of such a proportion of the entire stock as the stock transferred to Easton bore to the entire capital stock of the company at that time.

Thirteenth. The court erred in not deciding that Turner, for the North Chicago City Railway Company, held the certificate of stock subject to the same trust as DeKoven, and to the equity and interest of plaintiff, and in not deciding that Easton and Carey succeeded only to such title as said company had, and acquired no higher or better title.

Fourteenth. The court erred in not deciding that the Evanston Company was bound to issue a new certificate to appellant for 875 shares of its capital stock, or a new certificate for such a proportion of its increased stock as 875 shares bore to its entire capital at the time of the transfer to defendant Easton, and account for the dividends upon such stock, or in lieu of such transfer and accounting, to pay to complainant the value of the 875 shares at or about the time of the transfer of the same to Easton.

POINT I.

Contracts "A," "B" and "C" are to be read as one.

Under contract "A" the Evanston Company was to pay Goudy $25,000, only upon the complete performance by him of the agreement on his part. He was not made liable to claim of damages in case of non-performance.

The contract reads:

"It is further understood and agreed by the parties hereto that if the said party of the second part fails to perform any of the stipulations and covenants herein on his part to be performed he shall not be liable for damages beyond the loss of the right to the compensation and price or the just part thereof agreed to be paid."

Fols. 38, 39.

As to contract "B," a failure of performance on the part of Stickney did not work a forfeiture.

The contract reads:

"The second party *may declare the contract at an end and all* work done and material furnished shall be retained as liquidated damages."

Fol. 41.

There was no breach of this contract on the part of Stickney and Company because the right of way was not obtained so that the work of construction could go on.

It is not claimed that the Evanston Company declared this contract at an end.

Contract "C" was entered into on the part of Stickney and Company for the purpose of acquiring the control of the franchise and property of the Evanston Company, including its right of way free from all indebtedness.

Stickney and Company paid to Goudy $20,000, to be used in purchasing right of way for the Evanston Company.

The $25,000 to be paid by the Evanston Company to Goudy upon his obtaining the right of way, had the contract been performed, would never have been paid to DeKoven as trustee for Stickney and Company, since Stickney and Company would have become the owners of the stock and had control of the Evanston Company.

Upon default by Goudy and the payment of $25,000 to DeKoven in trust for him, Stickney and Company would have become entitled to a transfer of the stock and note, and thus would have acquired control of the Evanston Company free from indebtedness, and have been in a position to acquire the necessary right of way and construct the road. The effect of the assignment by Goudy to DeKoven of his claim against the Evanston Company, was to release Stickney and Company from paying the $25,000 for the Evanston Company.

POINT II.

The bill is brought by complainant to enforce an express trust and obtain the transfer of the legal title to the stock and note. The contention of complainant is that the case stands as though DeKoven had transferred the stock and note to the North Chicago City Railway Company prior to July first, 1881. That he was relieved from payment or tender to DeKoven of the $25,000 after the time fixed for payment, because before that time DeKoven had wrongfully put it beyond his power to perform the trust on his part, and that tender in the bill and payment into court leaves the

case in the same position as though tender or payment had been made to DeKoven before he violated his trust.

The right to the relief sought does not depend upon special circumstances as where specific performance of a legal obligation is demanded, but upon the ground that complainant's rights as *cestui que trust* are cognizable only in equity.

Says Judge Story; "In case of trusts created in relation to particular titles, a bill in equity will lie to enforce the trust and compel a transfer of the property even though it be bank shares."

1st Story's Equity Jur. 724.
Cowes vs. Whiteman, 10 Conn. 121.
Clarke vs. Flint, 22 Pickering, 231.
Weaver vs. Barden, 49 N. Y. 286.

By the contract Exhibit "C," Stickney & Company purchased, not simply stock in the market and for market purposes, but the majority of the stock of a railroad company, with a view of acquiring the control and ownership of it.

The contract provides:

"That when said road is completed and the control of the Chicago & Evanston Railroad shall be transferred as herein provided, the second party shall cause it to be equipped with proper rolling stock and put in operation from its southern terminus to Calvary Cemetery."

Fol. 32.

It has been held that in contracts for stock, a bill ought to be maintainable generally in equity for a specific delivery thereof upon the ground that a court of law cannot give the property, but can only give a remedy in damages, the

beneficial effect of which must depend upon the personal responsibility of the party.

Doloret vs. Rothchild, 1 Simons & Stuart, 500.
Natharn vs. Thornton, 10 Vesey, 161.
Gardner vs. Pullem, 2 Vernon, 394.

The present rule of the English chancery is stated by Judge Story, as follows:

"That a specific performance of a contract to convey shares in a railway, or other private corporation, will be decreed, on the ground that such shares are of uncertain value, and not always readily obtainable in the market."

1 Story Eq. Jur. 724.
Treas. vs. Com. Mining Co., 23 Cal. 390.
Leach vs. Forbes, 11 Gray, 506.
Todd vs. Taft, 7 Allen, 371.

In Bank of Alexandria vs. Seton, 1 Peters, 299, a party held bank stock in trust for the complainants, standing on the books of the bank in his name but known by the bank to be held in trust. By an arrangement between him and the bank it was transferred to the bank in payment of his own debt. The complainants filed their bill against the bank to compel a transfer to them. It was objected that the subject matter of the bill was not properly cognizable in a court of chancery, but that the remedy was at law and the party to be compensated in damages. The court said:

"With respect to this objection it has been said that a court of chancery will not decree a specific performance of contracts except for the purchase of lands or things that relate to realty and are of a permanent nature, and that where the contracts are for chattels and compensation can be made in damages, the parties must be left to their remedy at

law; but notwithstanding this distinction between personal contracts for goods and contracts for lands is found laid down in the books as a general rule, yet there are many cases to be found where specific performance of contracts relating to personalty have been enforced in chancery, and courts will only weigh with greater nicety contracts of this description than such as relate to lands."

The court then proceed to apply the doctrine of trusts, and say it is a well settled rule of equity that all persons coming into possession of trust property shall be considered as trustees and bound with respect to that special property to the execution of the trust. That the contest was not one to enforce a contract with the bank, but to charge the bank as a trustee because it took with notice.

It was contended in the court below that complainant's remedy, if any, was at law. In support of that contention the following cases were cited:

The South Wales R. R. Co. vs. Wythes, 1 Kay & Johnson. 186. This was a case where the plaintiffs, having a bill before parliament for a railway or authorizing the building of a railway, the defendants, who owned an estate to be benefitted by the railroad entered into an agreement to build it for a certain sum, and afterward refused to perform their agreement. Bill for specific performance.

The court held that it could not supervise the building of a railroad; that the plaintiffs had the land, or the right to obtain it, and the right to build a road; that they could build it and sue the defendants at law for any excess over what they agreed to build it for.

In the case at bar the complainant has neither the right of way nor the right to obtain it, nor the right to build the road; nor can he obtain it except by the transfer of this stock; nor is there difficulty about securing the defendants.

They are entitled under the contract to $25,000, which has been tendered, and which complainant proposes to pay into court for the use of defendants. Complainant demands the railroad in specie, and cannot have it without the assignment of the stock.

Peto vs. Brighton, &c., R. R. Co., 1 Henning & Miller, 466, is a case where the defendants had contracted to give the plaintiffs for building their road a sum in debentures and stock, and plaintiffs agreed to build it. The defendants refused to comply and sold the stock to another company. Bill for specific performance.

The court refused it, upon the ground that if they ordered the defendant to tranfer the shares to the plaintiff they could not specifically compel the plaintiffs to build the road.

Ross vs. Union Pacific R. R. Co., 1 Woolworth Cir. Ct. Rep. 26, is a case where the plaintiff had contracted with defendants to build its railroad, receiving in payment, 1st, government bonds; 2d, paid up stock; third, mortgage bonds. After spending about $50,000 in work by the plaintiff, defendant refused to perform the contract and executed deeds of trust which disposed of all the assets of the company and conveyed away the entire property upon which the plaintiff was to be secured for building the road. Bill for specific performance, and to enjoin the issue of bonds under the various deeds of trust and to compel specific performance.

"The contract," says the court, "provides for three classes of securities: 1st, government bonds; 2d, paid up shares of the company; 3d, bonds secured by mortgage. The bonds of the United States are government stocks. The decisions are clear that a covenant for their delivery will not be specifically enforced in a court of equity." And the learned judge expressed the opinion that the same rule ought

to apply to railroad stock except "in cases where the law affords no sufficient compensation on account of some peculiarity of the stock, or the situation of the parties," and that the court could not enforce the contract piecemeal; that it could not compel the delivery of the government stocks, consequently not of the railroad shares, and that it could not compel plaintiff to construct the road, etc.

POINT III.

Goudy did not complete his contract with Stickney and Company by obtaining the right of way before the first day of March, 1881. It follows that there was never any obligation on the part of Stickney and Company to make the deferred payments of $15,000 and $20,000. There was no breach on the part of Goudy so as to require the payment of the $25,000 by Stickney and Company.

1. Time was not the essence of this agreement. By its terms Goudy was to perform all the conditions of his agreement with the Chicago and Evanston Company in regard to the right of way by the first of June. Stickney was to pay him $20,000 on the signing of the contract, and in ten days after the performance in procuring the right of way $15,000, and sixty days thereafter $20,000, when the stock and property deposited with DeKoven were to be delivered to Stickney. If Stickney failed in the performance of this part of the agreement, Goudy had the option to declare the contract ended.

The contract reads:

"If the second party fail or neglect to make either of said payments, *the first party may declare this contract ended, and all* money paid and all rights under this contract shall be

forfeited, and may be kept by the first party as liquidated damages, and the said John DeKoven shall assign and transfer the shares of stock held by him to the party of the first part, together with any money in his hands, and thereafter all right and interest of the second party in said stock or said note, etc., shall cease and be at an end."

Fol. 33.

Observe there is a marked difference in the language in regard to the default on the part of Stickney and default on the part of Goudy. As to the last, the contract reads:

"If default shall be made by Goudy in the performance of any of his agreements herein contained, so that the deferred payments of $15,000 and $20,000 shall not become due and payable under this contract, and such default shall continue for three months after the first day of March, 1881, then by the payment by Stickney and Company of $25,000 in lieu of such deferred payments, it shall be the duty of DeKoven to deliver the stock, etc., to Stickney and Company, and they shall be entitled to recover from Goudy damages, etc., not exceeding $35,000; but in case Stickney and Company shall neglect to pay said $25,000 within four months after the first day of March, 1881, the trustee shall transfer the stock and property deposited with him to Goudy."

The last clause of this provision is to be construed in connection with the prior provision. So construed the contract remained in force even though there was default on the part of Stickney and Company, *until Goudy declared the contract at an end.*

There is nothing in this latter provision of the contract which indicates an intention to make time the essence of the agreement, and the fact that the right to declare a forfeiture is reserved in case Goudy performs on his part and Stickney

does not, emphasizes the omission to make any such provision in case of failure on the part of Stickney and Company to make the alternative payment of $25,000.

Judge Story says:

"Time is not generally deemed in equity to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract."

1 Story Eq. Jur. 776.

In Barnard vs. Lee, 97 Mass. 92, the court say:

"Although the parties may make time of the essence of the contract by express stipulation to that effect, it is not sufficient that they should name the time of performance in the contract, and thus manifest their intentions distinctly enough for the purposes of a court of law, but it must appear that they really intended to make such time an essential element of their agreement."

In Todd vs. Taft, 7 Allen, 371, a bill was filed for specific performance of the following agreement:

"Providence, Oct. 1, 1861: Received of Welcome Farnum, his note for fifty-two hundred and nine dollars and fifty cents, six months from date, for which I agree to transfer and deliver to said Farnum or his order fifty shares of the Providence & Worcester Railroad stock, upon the condition that said note is paid at maturity without grace, and I am to have dividends upon said stock and deduct the same from note at maturity; said Farnum to have full power to vote on said stock."

Farnum failed to notice or did not have in mind that the note was without grace; extensions of the note for periods of six months were made from time to time; the original contract was made May 1, 1860, but by such extensions and

renewals the contract of October 1, 1861, above set out, was substituted for previous ones, and in the latter part of March, 1862, would mature on the first of April, or if it had been payable with grace, on the fourth.

In the latter part of March, 1862, Farnum, the plaintiff, in an interview with defendant, asked him if he would carry the note longer, speaking of it as maturing on the first and fourth of April, to which defendant assented. The defendant replied that he could not carry the note much longer but would for thirty days. No definite arrangement was made at that time for the extension of the note.

Farnum, on the 29th of the same March, wrote defendant: "If you conclude not to carry your stock for another six months I will arrange to take it away. If I should not get it away short of ten days will it make any difference to you? Please reply by return mail." On the 30th of March defendant replied as follows? "I have made arrangements to use the money when due."

On the second of April Farnum wrote defendant: "Will you oblige me by sending the stock to some one of your friends in Providence; it will save me great trouble and expense if you will do so. Please reply by this evening's mail, if possible. Defendant on the same day replied as follows: "Yours was received; shall be in Providence Friday morning; will see you at Waterford when I go down."

On the fourth of April, which was the day named by defendant in his last letter, Farnum met defendant on the cars and then for the first time learned that he had been mistaken as to the maturity of the note, that it had matured on the first. The defendant refused to transfer the stock on the fourth, and on the tenth the plaintiff tendered him the amount of the note, which defendant refused.

The court said:

"The case is not that which would have been presented if Farnum had simply secured by the payment of a given sum of money the right to become the purchaser of fifty shares of stock, the right to be exercised or not, at his election, and to be attended with no forfeiture or liability other than the loss of the sum paid for the right to purchase if the state of the market on the day named made it for his interest to complete the purchase. Had the contract been one of this kind we might much more readily have held that the parties had made time of the essence of their contract, and that the omission to elect on that day to make the purchase would be attended with the loss of all right to do so on a subsequent day. Such was not the character of this contract. The sum of money advanced and the further sum stipulated to be paid at all events on the first of April, were the whole estimated value of the stock which was the subject of the purchase.

"It seems therefore to be a proper case for relief from forfeiture of a right occasioned by want of exact performance by the party on the day stipulated in the agreement, if there exists such grounds of relief, as entitles a party to the aid of a court of equity. The defendant took no measures to appraise the plaintiff of the precise day the payment was due by the terms of the note. Propositions had been pending between the parties for an extension of the loan or time of payment, and it was not until the defendant's letter was written that the matter was definitely settled. The plaintiff is entitled to maintain his bill."

In Taylor vs. Longworth, 14 Peters, 172, Longworth purchased of Taylor a lot in Cincinnati in 1814; one-third payable on signing the contract, one-third in six months, and the remainder in one year. A deed was to be given by

Taylor in the course of three months. Taylor did not give the deed nor did Longworth demand it. When the second installment became due it was not paid, but postponed by agreement. and interest continued to be paid under this arrangement until 1819. In 1819 Longworth was informed that there was an adverse claim to the lot. A suit was brought to test it, which was not terminated until 1829; in the meantime Longworth ceased paying interest. In September, 1822, no interest having been paid, Taylor commenced an action of ejectment, and in 1824 recovered possession of the lot of Longworth.

In June, 1825, the present bill in equity was filed by Longworth to enforce specific performance of the contract. The court said, after enumerating cases where time is made the essence of the contract:

"But except under circumstances of this sort or of analagous nature time is not treated by the courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it if he has not been grossly negligent and comes within a reasonable time, although he has not complied with the strict terms of his contract." And they sustained the bill.

In Secombe vs. Steele, 20 How. 94–104, the court said:

"Time may be made the essence of a contract by express stipulation, or it may become essential by considerations arising from the nature of the property or the character of the interest bargained, and the principle of the court of equity does not depend upon considerations collateral to the contract merely, nor on the conduct of the parties subsequently showing that time was not the essence of the contract in the particular case. But it must affirmatively appear that the parties regarded time or place as an essential element in their agreement, or a court of equity will not so regard it."

In Coles vs. Shepard, 16 N. W. Rep. 153, the court say:

"We do not feel called upon to determine what would have been the legal effect of the provision making time the essence of the agreement if it was unqualified, for in our opinion it is materially qualified by the other provision authorizing the vendor at her option to declare the contract null and void. With this qualification the result is certainly no more than to treat time as essential by declaring the contract null and void, but not otherwise. This declaration must be made to the vendee. Until it is made the option is not exercised and the contract is not annulled, but in force."

2. Time of performance on the part of Goudy was extended at his request and with the knowledge and consent of the North Chicago City Railway Company.

Upon this point Mr. Stickney testified:

"I had several interviews with Mr. Goudy, and asked him how he was getting along in getting the right of way. He represented that he had got a good deal of it but that there was some portion he could not get without condemnation proceedings, and that he would be very seriously embarrassed by our commencing work under the contract before he had completed the condemnation proceedings, and he hoped that we would so manage affairs as to let him get out as easy as he could. He said that the right of way was going to cost him in any event very much more than he expected; that he had made a bad bargain and was going to lose money, and wanted us to so time our work and manage affairs as to let him get out as cheaply as he could; that if we commenced work under the contract the property owners would all see that the work was going to be built and would naturally insist upon getting all they could, and if we did not com-

mence the work their anxiety to get the road built would be an inducement for them to settle cheaply with him for the right of way." Fol. 637.

"This was about the time that the time was expiring. I told him certainly, we would give him all the reasonable time he wanted; that under the terms of the contract we might be liable to forfeit our interest if we did not make payment within a certain time. I told him that if we gave him some time we should want him to waive that condition of the contract. He said he would do it. I asked him if he would write a letter to me to that effect. He excused himself for the time being, saying he was busy then but would write me such a letter and forward to me at St. Paul." Fol. 638.

"I find by reference to a diary that I kept at that time that I arrived in Chicago at 8 o'clock on the morning of February 21, 1881, from New York; that I left there on the 23d of February, at 9 A. M. During the time I was in Chicago I called upon Mr. Goudy and asked him how he was getting along in regard to this right of way. He replied that he had not met with the success he expected, and did not know as he would be able to have it all completed at the time the contract called for, and asked me if I would make him any trouble in case he failed. I told him no, that we should not make any point on the question of time if he did not. He said it would be impossible to complete his contract by the first of March, and that he should want an extension of time, and I told him that that was all right, he could have any reasonable time he required after that; that we did not want to make it any more burdensome to him than was absolutely necessary. I called upon Mr. Goudy again on the 13th day of April of the same year, and he still asked for further time, and it was granted him."

Fol. 657.

Mr. Goudy testified in reference to this statement of Mr. Stickney's:

"A portion of it is correct, a portion of it is not. I can readily see how Mr. Stickney made a mistake without intending to do so. I did not tell him at that time that I could complete the right of way for two weeks; I told him that I had met with great difficulty in my efforts to secure it; that the property owners had been dilatory and postponed action, etc. * * * That I hoped and expected to complete the business within a few weeks from that time. I did not make any application to him for any additional time, nor did he say to me that I might have any. He may have made the remark that a few weeks would make no difference to him, but I have no recollection of it. I understood myself at that time that I had until the first of June. As to the 13th of April, as already stated I was not in Chicago but was in Massachusetts. When I returned home I learned from Mr. Chandler that Stickney had been here, and he told me that Stickney said to him that a few weeks would make no difference to him about the completion of the right or way, or something to that effect."

Fol. 409.

Mr. Hill testified to a conversation that took place between Stickney and Goudy in Chicago in December, 1881, or January, 1882, on which occasion he was introduced to Mr. Goudy, and in which conversation Mr. Goudy stated that he was going on and doing the best he could to get the right of way and hoped to succeed.

Fol. 660.

At St. Paul in August 1882, it was stated by Mr. Stickney to Mr. Goudy that the contract had been extended from

time to time. This Mr. Goudy did not deny, but offered $7,000, or thereabouts to compromise the matter.

Fol. 661.

Mr. Hill further testified as follows:

"Mr. Stickney represented to me at different times that he had on the request of Mr. Goudy extended the time for Mr. Goudy to secure the right of way. On one occasion at least I remember Mr. Stickney's bringing either a telegram or letter from Goudy to my office, asking for an extension of time. After discussing it with Mr. Stickney, it was decided to grant Mr. Goudy's request and to extend the time to enable him to secure the right of way. Exhibit "E" is a telegram sent in answer to the telegram to which I refer. It was thought at the time that if Goudy did not succeed in getting the right of way before winter that the work would have to be postponed until the following spring, for the reason that owing to frost in the ground it would be more difficult to do the grading."

Fol. 666.

Understanding that the contract was still in force, Mr. Hill in February, 1882, had negotiations with Mr. Merrill on the subject of a transfer to the Milwaukee Company of the stock of the Evanston Company, etc.

Fol. 665.

At the suggestion of Mr. Merrill, Mr. Hill called upon Mr. Stickney for information, and on February 4th, 1882, Mr. Stickney wrote letter Exhibit "L." This letter plainly shows that Mr. Stickney understood at the time that the contract was still in force.

Fol. 683.

The following letters and telegrams show the understanding of the parties.

On December 26th, 1880, Mr. Stickney wrote to Goudy as follows:

"Dear Sir: I have been so busy all summer that I have had no time to think of Chicago and Evanston. I got the contracts, and the other day I read them over, and I would be pleased to have you inform me what success you have had in getting the right of way which your contract called for."

Receiving no reply, on January 3rd, 1881, Stickney wrote as follows:

"Messrs. Goudy and Chandler, Chicago: About ten days ago I wrote Mr. Goudy requesting information as to how far he had progressed in getting the right of way for the Chicago and Evanston Company. Not having heard anything in reply, I presume the letter miscarried. Please give me desired information at earliest convenience."

Fols. 457, 458.

On the 5th of January, Mr. Goudy replied as follows:

"Yours of 26th ult. is received. I expect to get right of way by the first of March, and have had no unexpected obstacles."

Exhibit "B," fol. 672.

After this Mr. Stickney had the interviews, as related, in which as he states Mr. Goudy desired an extension of time.

On May 2, 1881, Mr. Goudy wrote to Mr. Stickney as follows:

"Mr. Johnson of Janesville, and Mr. Barnes of Chicago, representing the Chicago, Portage & Superior Railroad Company, have applied to me to get right of way into the city over the Evanston Company within the limits. I endeavored to get such information as I could as to their enterprise and said I would receive any proposition they chose to make, and consult with other parties interested. They made no definite proposition, but I learned they were prepared to make sub-

stantially the same arrangement entered into with you. If that could be done they would like a lease or license to run over the line. Their scheme is the one having a grant up at Lake Superior and claiming some graded track about which you and I talked. They have recently made some re-organization and seem not to be willing to sell out. We parted with the understanding that I would consult with my parties and in a week let them know whether any proposition such as they desired will be entertained. I concealed the fact that any such arrangement as you made exists. You have all the facts. What shall I answer? *The whole matter is in your hands.* My main object was to get you into communication with them as to any rights they have to the line northwesterly. I will be glad to have a reply this week. We are getting along quite well with right of way and expect to complete the most important matters this week."

Complainant's Exhibit "C," fol 673.

To this Mr. Stickney replied under date of May 14th, 1881:

"W. C. Goudy, Esq., etc. Your letter of 2nd inst. is received. I cannot answer you definitely in regard to the matters therein mentioned until I have had time to consult with friends at St. Paul. I expect to see them next week and will reply."

Fol. 458.

This letter of Mr. Goudy's was written on the second day of May, twenty-nine days before the time in which he was to obtain the right of way expired. At that time he had obtained but a small part of the right of way.

He testified: "That at the time the contract was executed there was seven miles of right of way to be obtained from the north line of the city to Calvary Cemetery."

At the time of the alleged breach on the part of Stickney & Co., he stated—

"I do not suppose I had obtained contracts or deeds for as much as one-third of it at that time, but I had in process of being obtained by negotiations and verbal promises perhaps two-thirds of it, but not actually concluded by the execution of papers."

Fol. 421.

No proceedings at that time had been commenced or condemnation had. The first petition ever filed by the Evanston Company for condemnation was on the 2d of August, 1881.

In his letter of May 2nd Goudy stated that he was getting along quite well with right of way and expected to complete the most important matters that week.

Nothing further was done until August 26th, 1881, nearly two months after the time of the alleged default on the part of Stickney and Company.

Mr. Stickney telegraphed to W. C. Goudy:

"Have you got the right of way matter all settled so I can go to work on construction at once. Answer."

Fol. 459; complainant's Exhibit "E," fol. 674.

To this telegram Mr. Goudy answered on August 27th, as follows:

"Some proceedings pending to be tried within twenty days, and think no work should be commenced before that time."

Fol. 674, complainant's Exhibit "D."

On the 29th of August, following, Mr. Stickney telegraphed to Goudy:

"No objection to your taking more time to secure right of way, but in that case *you must not expect us to commence work until next spring.*"

Complainant's Exhibit "E," fol. 674.

On September first Mr. Goudy replied by letter to Mr. Stickney, as follows:

"On receipt of your last dispatch I was about to answer that I had the time for completion fixed in the grants of right of way July 1st, 1882, but that I thought the track in the city ought to be relaid this fall, so that if there was delay by injunction the entire work would not be postponed until July next. Before answering, however, I received a proposition from the Milwaukee and St. Paul desiring to make a contract whereby that company could use track from the junction with them on Hawthorne Avenue to Southport Avenue on some equitable basis. Their purpose is to run on northwesterly to Deering's Reaper Factory, on northwesterly on Fullerton Avenue. I enclose a plat which will give you the location, etc. * * * The question is one of Turner's. What do you say. * * * Please give me an immediate answer and say what terms, etc., you think are proper."

Complainant's Exhibit "F," fol. 675.

On September 14th, Mr. Goudy wrote again as follows:

"I wrote you 1st inst. at St. Paul to this effect, etc." (quoting substance of letter of September 1st.)

The letter proceeds as follows:

"Having these things in view the questions are, will you consent to their use of the additional track, and if so on what terms. *If you do not wish to do any work this fall, the proposed arrangement will enable us to get track in the city down before winter, and you can go on with it in the spring.* I promised to answer before this, but your failure to get my letter of the 1st has so far prevented my giving it. I told Mr. Atkins we should reserve any right we now had to allow any other company or cars to use the track."

Fol. 677.

To this Mr. Stickney replied as follows:

"I have been too busy to give matters any particular consideration. Please say to Atkins you will make an arrangement on equitable terms, and draw out of him his idea. I will see you this P. M."

Stickney and Company were ready to commence the work of construction in the fall of 1881.

A telegram of August 26th, from Stickney to Goudy, inquired, "Have you got the right of way matter settled so I can go to work on construction at once?"

Stickney had been waiting since May, and had heard nothing from Goudy on the subject up to this time.

Goudy replied on August 27th as follows:

"Proceedings pending to be tried within twenty days. Think no work should be commenced before that time."

Fol. 674.

Stickney was willing to comply with the suggestion or request of Goudy, and replied on August 29th:

"No objection to your taking time, but in that case you must not expect us to commence work until next spring."

Fol. 459.

Goudy made no reply and no objection. By his silence he must be held to have consented.

In his letter of September 14th, above referred to, he writes:

"If you do not wish to do any work this fall the proposed arrangement will enable us to get track in city down before winter, *and you can go on with it in the spring.*"

Thus we have from Mr. Goudy a recognition in writing of the contract as in full force in September, 1881.

Mr. Stickney answered Goudy's letter of September 14th, and on the 27th of the month had an interview with him in Chicago.

During that interview, the subject matter of the letter of the 14th was discussed.

Mr. Goudy states:

"Stickney thought that the privilege asked by the St. Paul was worth a large sum of money, and named some considerable amount. I did not go to see Mr. Atkins as Stickney suggested in that note, because I thought it was a preposterous idea, expecting the St. Paul people to pay $40,000 for that privilege, and nothing was done about it.

"I insisted then that the road must be completed and put in order inside the city limits during the fall, and stated to him, as I had before written to him, that I had grants of the right of way, which would expire, unless the road was completed and in operation by the first of July, 1882, and if the work in the city was deferred until spring, there would be no probability that those conditions could be made, and the right of way would be lost; and that it was probable that we would meet with injunctions, etc. * * *

"I told him that if an arrangement could be made with the St. Paul Company to put down the track for about 1500 feet, that it wished to use, and at the same time a contract with them to put down the balance of the track in the city, which would be about as much more, that it would be an easy way to meet that difficulty, and then the road could be completed in the spring before the first of July, outside of the city.

"We also talked considerable about what was known as the St. Paul and Portage Road, which was a paper road, in the hands of some parties who were represented in this city by Mr. Barnes. Mr. Stickney said he wanted to get the control of that charter so as to build a road from Evanston, the terminus of the Evanston line, on and through Wisconsin. * * *

"Mr. Stickney also asked me for the certificate representing the shares which had been owned by Haskins, amounting to 110⅔ shares. He had requested me to get it if I could. I purchased it from Haskins and paid him $250 in my own money. I stood in this way until the visit of Stickney in September, 1881. On the 30th of that month he called my attention to it, and asked me about it. The certificate was surrendered and another issued to him, and he gave me his check for $250.

"Stickney went away without any definite arrangement being made as to the construction of the tracks in the city that fall or any other time. He requested me to try to make this arrangement with the St. Paul people. I did not pursue the negotiations, and Mr. Atkins, the superintendent, did not speak to me afterwards about it.

"I did not see Stickney or hear from him until the 19th of December. We had some conversation at that time about the matter. I told him that I was unwilling to go on under the contract; that the right of way was not then procured. The difficulty in obtaining it had been increasing all the time, * * * and if anything further was done, there must be a new arrangement made by which a larger sum of money was to be paid for the right of way.

"He stated to me in the course of the conversation substantially this: 'I got out those contracts the other day, and I saw the darned thing had run out,' which was his exact language, and he says, 'Now I would like for you to write me a letter which I can show to my people up at St. Paul, and give us a chance to go on with it.'

"I told him it would be impossible to do so, unless some modification for changes or increased compensation was made.

"He said: 'Well, there is nothing mean about me, and I am going to do what is right about this thing. I have resigned my position as manager of the Canadian Pacific, to take effect the first of January, and I will come down here immediately, and I will spend most of the month of January here. I believe there is money in this franchise, and you and I will get together and see what we can make out of it. I think we can make some money for you, and make some money for me.'

"He went away and I did not see him from that time until the 16th of January, 1882."

Fols. 379–381.

Mr. Goudy was asked as to the circumstances of the parties on the 27th day of August, and during September, 1881, and testified:

"The right of way was not procured at that time. * * * I had not heard from Stickney since the last letter of May 14th. * * * I supposed Stickney had abandoned all idea of going on with the contract, paying any money or doing any work. * * * I had worked at procuring this right of way before I had made the contract with Stickney, and in addition, I had invested a good deal more work and labor in it. I had the same motive for getting the same railroad built, and I had proceeded after the first of July, trying to get the right of way. When I received the dispatch of August 26th from Stickney I was very much surprised. I had then no assurance in any way I could induce any other person to take hold of the enterprise. I was willing then that Stickney and his associates should go on with this contract and complete the road on certain conditions, and one was that they should build in the city during

the fall, and to complete the road in the spring before the first of July, as I telegraphed to him and wrote him."

Fol. 387.

It will be seen, however, by reference to the telegrams and letters, that Mr. Goudy did not insist upon the work going on that fall, but on the other hand assented to the delay of the work until the next spring.

In reference to this interview Mr. Stickney states:

"It was a repetition almost of our former conferences. The right of way was a great deal more difficult to get than he expected; that it was costing him a great deal more money than he expected; that he thought they would have it ready to commence work on in the spring. I did not dissent. We had already consented by telegrams."

Fol. 642.

That Stickney and Company still considered the contract as outstanding is evident from the fact that they had negotiations with the Milwaukee Company for sale of the stock, etc., in the latter part of December, 1881, or in January, 1882.

Fol. 664, Letters; Complainant's Exhibits "L" and "M," fols. 683, 684.

And from the fact that on the 4th of May, 1882, Mr. Stickney entered into negotiations with Mr. Lowry on the subject of the transfer of the stock, etc., and at Stickney's suggestion Mr. Lowry called upon Mr. Goudy to make inquiries.

Fols. 384, 643.

And by letter of Stickney of May 29th, 1882, to Mr. Goudy, in which he says:

"I am in receipt of letter and telegram from Mr. Lowry saying you claim I have forfeited my rights in the Evanston Railway. I am very much surprised at the information, as

the delay has been entirely at your request, both verbal and written. Your letters and telegrams I have. I think I am entitled to some explanation. I would like to hear from you."

Fol. 460.

In answer to this letter Mr. Goudy did not deny that the time had been extended at his request. He did not in any way qualify the statement of Mr. Stickney in that regard, but wrote on June 5th as follows:

"I regret that you did not let me know of your being in Chicago the day before the date of your letter. I called at the Pacific Hotel to see you, but found that you had then left.

"The contract was made by me as one party, and by you and certain other persons as the other party. I learned some time ago from reliable source that your associates had abandoned all idea of proceeding with the execution of the contract, which by its terms had expired, and your failure to come to Chicago as proposed, or to pay further attention to the matter, confirmed the information. Yet I have not made any arrangement with other parties."

Fol. 461.

From this letter Stickney had a right to suppose that Goudy did not at the time of its writing regard him as in default or the contract at an end. Stickney knew that the time fixed in the contract had long since expired. The claim made in this letter to Goudy was that the time had been extended at his request.

Why did not Mr. Goudy deny the statement of Mr. Stickney? He knew that Mr. Stickney understood that he was not required to go on with the work until the spring of 1882, and that the contract was still in force.

His statement that he thought the contract was abandoned because Stickney did not come in January is hardly

consistent with his conduct. Prior to the first day of January he was seeking for another purchaser. Why did he try to find a purchaser of the stock within one week after his interview with Stickney?

He testified:

"After we had this conversation on the 19th of December, and according to a memorandum I have, I think it was on the 23d of that month Mr. Walker inquired of me if I had still the control of the Evanston road, or if it was for sale. I made no reply to him, and he then told me it had been sold to Mr. Merrill, of the St. Paul people, by Mr. Hill; that in a subsequent conversation with Walker or Merrill I learned that Hill asked $75,000 for it. *I replied to Walker that Stickney and his associates did not intend to build that road as they agreed, and were trying to speculate on my contract and make money out of it;* that I thought the St. Paul people had better deal directly with me; that Stickney's interests had ended by default, and that he had nothing to sell; that if the St. Paul people wanted to negotiate seriously for it they had better deal with me."

The statement thus made shows that he did not want to hear from Stickney, and that his subsequent conduct was not based upon the ground that he did not hear from Stickney in January, 1882.

Again, in May, prior to his letter of the 29th, Goudy had demanded a return of the stock and note from DeKoven, and on the 13th of June DeKoven delivered the stock and note to the North Chicago City Railway Company, having Goudy's consent to do so, and yet he writes on the 29th, "I have not made any arrangements with other parties." Thus plainly intimating that the contract was still open and in force.

On the 16th of June Mr. Stickney was in Chicago and had an interview with Goudy.

Goudy testifies:

"I don't remember how the conversation had commenced, but he had previously been advised that I claimed the contract had been ended and forfeited, and that was the subject matter of the conversation."

Fol. 385.

When had Mr. Stickney been so advised by Mr. Goudy? The interviews and correspondence show the contrary.

"In this interview Stickney asked if they were not to be permitted to go on and build the road if they would pay an additional sum of money to procure the right of way. I told him 'No,' that I had no further control of the matter. That the certificate of stock and note had been claimed by Mr. Turner as president of the North Chicago City Railway Company, and been delivered to that company."

Fol. 385.

The next interview was on the 15th of August. (Fol. 387.) In that interview Mr. Goudy states that he offered to pay Stickney and Company $7,500 in settlement, and that he did not tell, and was very careful not to tell, that he had entered into negotiations with Easton and Carey.

Fols. 438–439.

POINT IV.

1. From the testimoney, especially from the letters and telegrams, it is plain that both parties treated the contract as continuing and in full force until June, 1882. At no time prior to that date had Goudy notified Stickney that he did not regard the contract as continuing and that he would not observe it.

Ahl vs. Johnson, 20 How. 511, case of a contract for conveying land. After the time for payment had expired,

the vendor had frequent interviews with the vendee in which he expressed himself willing and ready to give a deed whenever the purchase money was paid. He made no formal demand for it, and gave no notice of his intention to treat the contract forfeited, because it was not paid. In the fall of 1851, the money not having been paid, the vendor requested payment and the vendee excused himself on the ground that he had a great many debts due. In reply the vendor said he was ready to make him a deed as soon as he would pay the balance of the purchase money. It was in proof that in October and November, 1851, the vendor asked the vendee several times for the balance of the purchase money.

The court say:

"It is plain from the language of the request, as well as from that used by the vendee in reply, that the object of the vendor was more to hasten the action of the vendee, and prompt him to an early compliance, than to make any formal demand of the money with a view of terminating the agreement, or to impair the right of the vendee to make the payment at a future time. Such unquestionably was the impression which the conversation at the interview was calculated to produce upon the mind of the vendee and considering all the circumstances under which the interview took place, and the relations of the parties to each other in respect to the matter in controversy we think it was the only reasonable construction which could be put upon the language of the vendor consistent with fair dealing on his part. The circumstances we think abundantly show that the delay prior to that time was not the cause of complaint.

"Time may be, and often is, of the essence of a contract for the purchase of real estate, so that courts of equity will not interfere on behalf of either party. It may be made so

by express stipulation of the parties, or it may arise by implication from the nature of the property or the avowed objects of the seller or purchaser.

"On the other hand the general doctrine on this point is expressed in the maxim that time is not of the essence of the contract in equity, and except in cases like those already mentioned and of kindred character, courts of equity have as a general rule always claimed and exercised the right to decree a specific performance of an agreement in respect to the purchase and sale of real property at their discretion, and those to a more liberal extent in favor of purchasers than those who contract to sell such property. There was no negligence or delay of performance on the part of complainant prior to the tender of the money on the first of November, except what he reasonably would have on the ground of acquiescence or waiver on the part of the vendor."

Apply the principle of this case to the December interview as related by Mr. Goudy.

Goudy had not acquired the right of way by the first of March or June. In August, in reply to the telegram of Stickney asking if the right of way was procured so that he could go on, he replied that some right of way proceedings were pending, which would not be concluded under twenty days, and that until then no work ought to be done; he states that he was anxious that the road should be built, and was willing that Stickney should go on and build it. In September he repeatedly consults him in regard to the property, with no intimation that Stickney's interest in it is forfeited, or that the contract is at an end.

According to Mr. Goudy, Stickney said in this interview there was nothing mean about him, and he requested Goudy to sound Atkins and see if the Milwaukee folks would build the road in the city limits that fall, and in this Goudy

acquiesced, giving no intimation that he intended to rely on any forfeiture or claim that the contract was at an end.

In Lovejoy vs. Stewart, 23 Minn. 94, Wardwell had executed a bond to Lovejoy to convey real estate to him upon payment of $400 on or before September 27th, 1865. Lovejoy from time to time paid the annual interest. In the fall of 1865, and in the fall of 1866, Wardwell said that he would let the principal run and remain at interest, although no definite extension was agreed upon.

Wardwell sold to Stewart, who examined the record of the bond but did not know of the payments or of the relation of the parties, and asked no questions. Lovejoy then offered to pay the amount due on the bond and take a deed. Up to this time Wardwell had never demanded the money due on the bond, nor had he ever notified Lovejoy that he claimed that the bond was forfeited.

The court say:

"Stewart's rights are no greater than Wardwell's. Time was not only not expressly made essential by the terms of the bond, but, so far as the principal was concerned, Wardwell had consented to let it run. Under these circumstances it would have been Wardwell's duty had he retained the land, and it was Stewart's duty as his successor if he desired to assert a right of property in hostility to that of Stewart, to take some affirmative action looking in that direction. By so doing he could have compelled the plaintiff either to elect by paying the arrears of the bonds, or abandoning the contract. But the court has found that he has not even demanded or required the fulfillment of the terms of the bond, and this, together with the negotiations between Wardwell and Lovejoy, clearly tend to negative the idea that he regarded the contract as abandoned."

2. A default having been once waived by acquiescence and delay, Goudy could not avail himself of it without a formal notice to Stickney of his intention to do so and giving a reasonable opportunity thereafter to perform.

In Webb vs. Hughes, Law Reports, 10 Equity Cases, 280, the court say:

"Now the rules of this court are plain. A purchaser may by the terms of the agreement make time the essence of the contract, but it requires a very strict stipulation to affect that object. Or he may make time the essence of the contract by notice at any time during the negatiations. If therefore time was not the essential part of the contract, the defendant might have made it so, but if time be made the essence of the contract, that may be waived by the conduct of the purchasers; and if the time be once allowed to pass, and the parties go on negotiating for the completion of the purchase, then time is no longer of the essence of the contract.

"But on the other hand it must be borne in mind that a purchaser is not bound to wait an indefinite time, and if he find while the negotiations are going on that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor and fix a period at which the business is to be determined; but having once gone on negotiating beyond the time fixed he is bound not to give immediate notice of abondonment, but must give a reasonable notice."

POINT V.

If, on the 2d day of July, 1881, the North Chicago Company had instituted its suit in equity against DeKoven and other proper parties, would it have been entitled to a decree requiring DeKoven to convey the stock and note to it?

The answer to this question must be in the negative.

1. The North Chicago City Railway Company was incorporated under an act of the legislature of Illinois in February, 1859. (See last section of the act, hereto attached, which provides that the provisions of the act shall apply to the North Chicago City Company.)

Under its charter the North Chicago City Railway Company, which is a street railway company, could not hold the legal title to the stock of the Evanston Company, a steam railway company, and *thereby own and control such company.*

As to the claim of defendants that the North Chicago City Railway Company had the legal title to the stock, and owned and controlled the Evanston Company,—

Turner testified:

"I am president of the North Chicago City Railway Company; have been since 1867. It owned and controlled the Evanston Company; it became such owner in the fall of 1864. The stock was generally held in trust by the directors of the company, but they had no individual or personal interest in it." Fols. 534–535.

"No one had a right to sell the stock but the North Chicago City Company." Fol. 543.

"The company purchased it from C. H. Haskins, and part of it from a Mr. Hurd." Fol. 543.

"The North Chicago Company had no interest in having the Evanston road built." Fol. 549.

Goudy was asked:

Q. "Who had possession of the certificate of stock in June, 1882? A. The North Chicago Company. The certificate had been surrendered by DeKoven and delivered to Turner, as president. He surrendered that certificate and another issued to Voluntine C. Turner, president, and delivered it to him." Fol. 391.

"I made a new arrangement with Turner, as president. I agreed to pay $25,000 for his company's interest in the stock and franchises of the Evanston Company, and the note." Fol. 392.

"The North Chicago Company owned the stock and franchise of the Evanston Company." Fol. 405.

"The stock was owned by the North Chicago Company. Turner had no more interest in it than I had." Fol. 436.

"There was a consultation among the directors. He was authorized to sell to me." Fol. 437.

It has been firmly settled that one railroad company cannot purchase shares of stock in another railroad company, especially for the purpose of the control of the latter.

If one railroad company may at its option buy the stock of another, it practically undertakes a new enterprise, not contemplated in its charter. This it cannot do by implication. The power to do so must be clear.

Georgia R. R. Co. vs. Collins, 43 Ga. 13–57.
Elkins vs. R. R. Co., 36 N. J. Eq. 5.
Great Northern R. R. Co. vs. Eastern Cos. Ry. Co., 21 L. J. Ch. 837.
Pierson vs. R. R. Co., 13 Am. & Eng. 102.
McIntosh vs. R. R. Co., 34 Fed. Rep. 582.
Franklin Co. vs. Savings Bank, 68 Me. 43.

A contract prohibited by statute is void.

Bank vs. Owens, 2 Peters, 538.

Insurance Co. vs. Rosenthal, 55 Ill. 91.

The acquisition and disposition of the stock by the North Chicago City Railway Company was void for want of power. Under the facts of this case it had no power to purchase, hold or dispose of the stock. It did not acquire it as pledgee or purchase it in satisfaction of the debt. It acquired it by purchase and placed it in the hands of its own board of directors. It claimed to control the Evanston Company. It demanded of DeKoven a transfer of the stock to it, and a transfer of the stock was made to Mr. Turner, as its president.

Thomas vs. R. R. Co., 101 U. S. 71.

2. The legal title to the stock at the time of the transfer to DeKoven stood in the name of Goudy and his associates directors of the Evanston Company.

Neither the face of the stock or the books of the company contained any words of limitation. Their ownership was apparently absolute.

Fol. 416.

The North Chicago Company in its contract with Goudy agreed:

"To sell and assign all the interest it had in the shares of the capital stock of the Chicago and Evanston Company."

At that time the indebtedness of the Evanston Company was in open account. Soon after it was put in form of a note, and the only claim, if any, which the North Chicago Company had to the stock was as security for the note. Goudy and others may have held the legal title, subject to such equity of the North Chicago Company.

3. Turner was president of the North Chicago City Railway Company; Goudy was a director.

By the contract made with Stickney on February, 18, 1880, (Exhibit "1," fol. 447), it was provided that the Chicago and Evanston Company, upon payment, etc., "shall execute, issue and deliver to Stickney its bonds, etc., or instead thereof, at least 880 of the 1000 shares of the stock of such corporation shall be transferred and assigned to Stickney and Company.

This contract was authorized by the board of directors of the Evanston Company of which Mr. Turner was one; and no claim was made that that company had not full authority to transfer, or to cause a transfer to be made of the entire title of the stock, legal and equitable.

Thus it appears:

a. The North Chicago Company did not transfer to DeKoven the legal title to the stock.

b. Goudy surrendered a certificate representing 500 shares of the Evanston Company. His associate directors surrendered shares held by them. A new certificate was issued, in the name of DeKoven, as trustee, and delivered by Goudy or the Evanston Company to the trustee.

That certificate of stock was never in the hands of the North Chicago City Railway Company. It did not cause the transfer to be made to DeKoven.

c. The North Chicago Company did not hold the legal title to the stock. It held nothing which it could transfer to DeKoven or to Goudy except possibly a mere equity to the extent that it had an interest in the proceeds of the sale of the stock to secure the indebtedness of the Evanston Company to it.

The North Chicago Company not having authority to purchase the legal title to the stock, and the control of the Evanston Company from that company, it did not and could not acquire the title to the stock from DeKoven.

POINT VI.

The North Chicago Company acquiesced in, adopted and became bound by the understanding and agreement by which the time of performance on the part of Goudy was extended.

1. It had assured Stickney by the action of its president, who was also a director of the Evanston Company, concerning the contract of February 18th, 1880, that the Evanston Company had the full disposing power and control of the stock.

2. Stickney did not know the terms of the contract between the North Chicago Company and Goudy, or its limitation as to time. This contract was not deposited with DeKoven.

Fol. 367.

It was not read to Mr. Stickney. Goudy claims that he stated the substance of it to Stickney, except as to the amount he was to pay.

Fol. 390.

Upon this point Goudy testified:

"I stated to Mr. Stickney substantially the facts as to the corporation and its property, its right of way and its stock, the ownership of the franchise and stock, and that while I was a purchaser from the company, in order to become a

seller to him, that I could not deliver that stock or the control, without paying the North Chicago Company a sum of money. The sum I did not name to him. Otherwise I stated to him substantially all the facts in the matter."

Fol. 359.

Goudy does not claim that he informed Stickney of the existence of the written contract between himself and the North Chicago Company, or of its limitation as to time.

Upon this point Mr. Stickney testified:

"My understanding was that the North Chicago City Railway Company had no interest whatever in the Evanston Company except a claim to so many thousand dollars against that company. I never understood and it never was represented to me that the North Chicago City Railway Company owned a dollar of the stock or had any claim on the stock in any shape or manner. I understood Mr. Goudy had the ownership of the stock. I think when I first commenced to negotiate with him he said the stock was outstanding, but that he could and would secure it."

Fol. 631.

3. The North Chicago Company did not hold the legal title to this stock. It knew that the legal title stood in the name of Goudy and others without any limitation either upon the face of the certificates or upon the books of the company.

Thus Goudy and his associates held the apparent legal title, and the indicia ownership with full power to dispose.

It knew of the contract between Goudy and Stickney, and under the circumstances its knowledge was such, and its action such, as to estop it from denying the authority of Goudy to deal with reference to the stock, and by a consent to the time of performance on its part.

4. It knew that the right of way had not been obtained, yet it made no claim upon DeKoven, and took no action in reference to the matter of obtaining a re-transfer of the stock.

As a corporation it must be held to have had knowledge of what its president and its director Goudy knew. In short, the relationship of the parties and their mutual interest was such as to make it evident that it had knowledge, and assented to all the acts of Goudy in the premises.

POINT VII.

DeKoven held the certificate of stock transferred to him, as trustee, as was apparent not only upon the books of the company but upon the certificate itself. The delivery by him to the North Chicago Company did not convey the legal title to the certificate because that company had no capacity to take the legal title. Nothing had been paid on the certificate. Its ownership carried with it only the right to control the Evanston Company.

The North Chicago Company under claim of title demanded from DeKoven a delivery of the certificate. The transfer to him was as president and representative of that company. He neither had or claimed any individual interest in it. He received it with notice of the contract between Stickney and Goudy, and with notice of the fact that the words "as trustee" were written on the certificate.

It follows that the legal title to the certificate did not pass from DeKoven to the North Chicago Company. Its claim to and exercise of control of the stock of the Evanston Company was unauthorized and void. If the legal title did pass to such company or to Turner as its representative, it

passed subject to the trust obligation of DeKoven and the right of complainant, and if the stock had stood in the name of the North Chicago Company or Turner at the commencement of the action, it would have been held subject to the right and equity of complainant.

Shaw vs. Spencer, 100 Mass. 382.

Duncan vs. Jaudan, 15 Wall. 165.

POINT VIII.

EASTON'S RIGHT.

Easton acquired no better right than that of the North Chicago Company.

1. There is no estoppel. Easton did not purchase any particular certificate of stock. He did not contract in reliance upon any statement contained upon any certificate of stock or the books of the Evanston Company. He did not rely upon possession and indicia of ownership in any person. He knew that Goudy did not have the legal title. Goudy did not assume to transfer to him the legal title. His contract was that Goudy should cause to be transferred to him the legal title. He relied upon the promise of Goudy to do so, and if Goudy failed he was responsible for breach of his agreement.

In McNeil vs. Tenth National Bank, 46 N. Y. 325, it was held that where the owner of certain shares of stock had pledged his certificate endorsed with an assignment and power of attorney in blank, and the pledgee wrongfully assigned the certificate to a bona fide purchaser without notice, the title of such purchaser was superior to that of the prior owner.

The Court said:

"The holder of such a certificate and power possesses all the external indicia of title to the stock, and apparently unlimited power of disposition over it."

See also Moore vs. Metropolitan Bank, 55 N. Y. 41.

In the cases last cited the owner of the stock or instrument had by his own act conferred the apparent title and absolute ownership upon another, upon the faith of which a purchase had been made.

In Davis vs. Bechstein, 69 N. Y. 440, the above cases were limited if not overruled. In this case plaintiff had executed a bond and mortgage to R., simply as an accommodation and to be used as collateral security for a loan which R. expected to make. R. did not procure the loan but assigned the securities in form absolutely to defendant who was a purchaser for value without notice. The action was brought to have the bond and mortgage cancelled. The court sustained the action upon the ground that the purchaser of a thing in action not negotiable takes it subject to all equities subsisting in favor of an original owner, and the immediate assignor can give no better title than he has himself. The defendant claimed that plaintiff was estopped according to the rule laid down in the above cases. The court held otherwise.

See also Mathews vs. Sheehan, 69 N. Y. 585.

Trustees vs. Wheeler, 61 N. Y. 88.

Green vs. Wannick, 64 N. Y. 220.

In Anderson vs. Nichols, 28 N. Y. 600, certificates of stock with a power of attorney endorsed upon them and signed so that they were transferable in the market, were wrongfully converted from the owner and were sold to the defendant; it was held that the latter acquired no higher

title than that held by his immediate transferrer, the one who wrongfully converted the stock, and that the original owner could recover the securities or their value.

Mason vs. Lord, 40 N. Y. 477.
Reed vs. Briggs, 72 N. Y. 467.
Telegraph Co. vs. Davenport, 97 U. S. 369.

In this case the court say:

"The great principle that no one can be deprived of his property without his assent, except by the processes of the law, requires in the cases mentioned, that the property wrongfully transferred or stolen should be restored to its owner. The maintenance of that principle is essential to the safety and peace of society, and the insecurity which would follow any departure from it would cause far greater injury than any which can follow in cases of unlawful appropriation of property upon those who have been misled and defrauded."

See Dewing vs. Padicaries, 96 U. S. 193.

The rule is the same with reference to stock certificates as to other personal property.

In Moore vs. Metropolitan Bank, 54 N. Y. 410, the court say:

"No one pretends but that a purchaser takes a non-negotiable chose in action subject to all defenses valid as to the original parties, or that the mere possession is any more evidence of title with the possessor than is that of a horse."

Within the rule established by the cases cited, if Stickney held the legal title to the stock, Easton, though a bona fide purchaser for value, would not have acquired title.

Does it make any difference that Stickney and Company had only an equitable title or interest? They did not by an affirmative act confer the apparent title and absolute ownership upon DeKoven.

Goudy had done all that was required of him when he placed the stock in the hands of DeKoven as trustee. Stickney and Company consented that the transfer be made in that form, and the right and title of DeKoven was qualified by words written on the face of the certificate he held.

It has been held that a bona fide purchaser through several mesne conveyances, starting from a trustee who sells the stock in breach of trust, is protected. This, however, was in cases where the certificate of stock upon its face showed an apparent title and absolute ownership in the seller.

Salisbury vs. Townsend, 109 Mass. 115.
Stinson vs. Thornton, 56 Ga. 377.
Lowry vs. Bank, Taney, 310.
Bedd vs. Farmers Bank, 52 Penn. St. 232.

In Salisbury vs. Townsend, 109 Mass. 115, the certificate of stock held by the trustee showed that he held it as trustee. The certificate purchased by the defendant, however, showed absolute title in the vendor.

2. There being no estoppel, if the equities are equal, that of complainant being prior will prevail.

In order to give the apparent title of Easton precedence, it must appear that he was a bona fide purchaser for value of the legal title to the stock.

In Pratt vs. Mining Company, 123 Mass. 110, plaintiff's certificate of shares with a forged power of attorney was delivered without his knowledge or assent to an auctioneer for sale.

This certificate was surrendered to the corporation, and it issued a new one in the name of the auctioneer, who sold it to a bona fide purchaser for value, and this assignee in

turn surrendered the certificate purchased by him and received another issued to himself. The owner brought a suit in equity against the corporation and the purchaser.

The court held that the plaintiff could maintain a suit against the corporation to compel it to issue a certificate of a like number of shares and to pay all the dividends thereon, but that plaintiff was entitled to no relief against the purchaser, who was a purchaser in good faith for a valuable consideration and without notice, and who did not hold the certificate of shares which the plaintiff had.

This is also a case where the certificate purchased, upon its face showed absolute ownership in its possessor, and where the purchaser held at the time a new certificate upon which his right as against the corporation depended. The forged certificate was void.

Perhaps this decision is not in harmony with the rule as laid down in this court in Telegraph Co. vs. Davenport, 97 U. S. 397. See also Dewing vs. Perdicaries, 96 U. S. 193, and in the New York cases cited.

Easton did not, as we have seen, purchase any certificate of stock or rely upon any statement or representation upon the face of any certificate, or upon the apparent title or ownership of any person.

His case is this:

Goudy agreed to cause to be transferred to him shares of stock. This he did not do. The party who assumed to transfer the stock at the request and by agreement with Goudy had not the title and therefore could not transfer it.

Goudy was not deceived. He knew the interest of Stickney and Company. The North Chicago Railway Company knew the interest of Stickney and Company. Easton was not misled. He relied upon his contract with Goudy and upon the ability of Goudy to perform it.

3. A certificate of stock was however issued to Easton directly from the Evanston Company, but in first instance delivered to the North Chicago Company or its representative; of all this Easton had knowledge.

The contract between Goudy and Easton was executed on the 8th day of August. At that time the certificate was held by the North Chicago Company. On the 19th of August Turner deposited the certificate in the bank with directions to transfer it to Goudy or Walker on or before September 5th, upon payment of $25,000. On or prior to the 24th, Easton was informed of such deposit, and at his suggestion Goudy went with him to the bank and endorsed upon the envelope containing the certificate that in event of such payment it be delivered to Walker or to Easton.

Fol. 393.

Easton therefore knew that Goudy proposed to transfer to him a certificate of stock held by the North Chicago Company, that nothing had been paid on it, and that the transfer meant the control of the Evanston Company. With such knowledge, and after the 24th of August, he to meet his obligations to Goudy made deposit in the bank. Afterwards Turner obtained the certificate from the bank, surrendered it to the Evanston Company, and procured in the place of it another in the name of Easton. This certificate was also deposited by Turner in the bank, and upon payment by Easton of $25,000, by the direction of the North Chicago Company the certificate was delivered to Easton. Easton, at the time he made payment and accepted a delivery of the certificate, knew that the North Chicago Company claimed to hold the legal title to the stock, and that his title was derived from and through that company. He must be held to have had knowledge of the fact that the North Chicago Company could not own or transfer the legal title to the stock.

Persons dealing with a corporation must be assumed to know the extent of its corporate power and take notice of any restrictions in its charter. This is clearly so where the duties and powers of the corporation are prescribed by statute or by charter. In such case all persons dealing with it must take notice of any limitation imposed by such statute or charter. The charter of the North Chicago Railway Company is by its terms a public act.

Pearce vs. R. R. Co., 21 Howard, 441.
Merritt vs. Another, Hoffman Chancery, 166.
Brady vs. Mayor, 20 N. Y. 312.
Wilke vs. Goddard, 3 McLean, 102.
Rooke vs. Wells, 4 McLean, 8

He testified as follows:

"On the start I supposed Goudy was the sole owner of the control of the Evanston Company. When he explained the position of the thing to me he said, I think 875 shares, most of the stock, was held by the North Chicago City Railway Company or V. C. Turner as security for the note; that on payment of the note Mr. Turner would transfer the stock."

Fol. 509.

Thus he was informed of the "position of the thing." If the North Chicago Company held an interest or equity in the stock only to the extent of securing its note for $40,000, he knew that he was not getting the legal title from that company. He did not rely upon having obtained the legal title when he paid the purchase price. He was put upon inquiry as to such title. Had inquiry been made the books of the company would have shown the facts.

That Easton had notice of DeKoven's interest, or that he held "as trustee," is apparent. He became interested in the

purchase of the stock as he states through a suggestion made by Mr. Wadsworth, who was at the time with himself a stockholder of the Milwaukee Company, and who knew that negotiations had been had between that company and Mr. Hill relating to a transfer of the stock. Mr. Easton in the first instanee called upon Mr. Walker, an attorney of the Milwaukee Company. Walker admits that he knew that complainant had had such negotiations with the Milwaukee Company, and had proposed to transfer the stock and the control of the Evanston Company to the Milwaukee Company early in the year 1882.

Fol. 471.

The certificate of stock showed on its face that no payment had been made on account of it, and that it was transferable on the books of the company.

Fol. 144.

The by-laws of the company provided that no certificate of stock should be good or binding on the company until it had been signed by the president and secretary, and had the seal of the company affixed and had been registered.

Fol. 692.

Easton testifies that "about the time of the completion of the contract I brought the books of record of the Evanston Company, and Mr. Carey took them with him to make an examination to see that everything was in order, then when he made his report that he found nothing out of the way, we entered into this contract and I made payment."

Fol. 498.

"Question. Was there anybody through whom you had made an examination, &c., except Mr. Walker?

"Answer. I think the minutes showed what had been done. Mr. Carey examined them."

Fol. 513.

POINT IX.

If Easton acquired legal title to the certificate of stock issued in his name it was because of the fault of the Evanston Company in accepting a surrender of the stock issued to DeKoven as trustee, and issuing in the place thereof a certificate of stock to Turner as president of the North Chicago Company, and upon its surrender issuing the certificate in the name of Easton.

It was put upon inquiry to ascertain whether or not the transfer by DeKoven was in violation of his trust obligation.

See Telegraph Co. vs. Davenport, 97 U. S. 369.

Where a corporation has notice that a stockholder holds stock as trustee for another, and the means of ascertaining the character of that trust are in its power, it is bound before making a registry of the trustee's transfer, to satisfy itself that the trustee has power to make the transfer.

Chatmann vs. City Council, 6 S. E. Rep. 158.

Bayard vs. Bank, 52 Penn. St. 232.

The fact that a certificate runs to the holder as trustee, is sufficient notice to the corporation.

Lowring vs. Salisbury Mills Co., 125 Mass. 138.

It is bound to see that the sale of the trustee is made in accordance with the terms of the trust. It is liable if it permits a sale by one trustee when there are two, and a general power of attorney by one trustee, where there are two or more, will not protect the corporation in its registry of the transfer signed by one only.

Bowlings Estate, 75 Penn. St. 312.

In St. Romes vs. Levee Steam Cotton Press Co., 127 U. S. 614, it was held:

"If a corporation, by negligence, cancels a person's stock and issues a certificate therefor to a third party, the true owner may proceed against the corporation to obtain the replacement of its stock, without pursuing the purchaser or those who hold under him."

See also Telegraph Co. vs. Davenport, 97 U. S. 369.
Lowring vs. Salisbury, 125 Mass. 138.
Pratt vs. Copper Co., 123 Mass. 110.
R. R. Co's Appeal, 86 Penn. St. 80.
Lowring vs. Frue, 104 U. S. 223.
Salisbury Mills vs. Townsend, 109 Mass. 115.

THE MEASURE OF RELIEF.

I.

Tender in fact of $25,000 before commencement of action was unnecessary. DeKoven transferred the stock before tender was due, and this put it out of his power to perform had tender been made. In any view tender was unnecessary for relief in a court of equity. The failure to tender would be taken into account only in the matter of costs.

Stevenson vs. Maxwell, 2 N. Y. 408.
Gill vs. Newell, 13 Minn. 462.

II.

Nothing had been paid on the stock. By acquiring the stock contracted for, Stickney and Company would have had the contol of the Evanston Company. At that time it had a right under an ordinance granted by the common council of the city of Chicago, in connection with the Chicago and Pacific Railroad, to about a mile and a half of track which had been laid on Hawthorne Avenue. This joint track had been used by the Chicago and Pacific under an agreement to pay the Evanston Company a fair rental. Aside from this rental, the Evanston had no tangible property or equipment. It had a right under ordinances of the city in Southport Avenue, and its tracks had been constructed to the boundary line of the city, though such tracks were out of repair and unfit for use.

Fol. 369.

What Stickney and Company purchased, therefore, was the franchise, and the right to control it and the property of the Evanston Company. By the act of Goudy, DeKoven, the North Chicago Company, the Evanston Company and Easton, complainant, as assignee of Stickney and Company, has lost that right. For it, Stickney and Company agreed to pay Goudy $55,000. The note of the Evanston Company for $36,000 was to be surrendered, the contract price which Goudy was to receive for procuring the right of way was to be assigned, so that Stickney and Company, upon payment of $55,000, would have acquired the control of the franchise and property of the Evanston Company free from indebtedness.

What was this right worth? The evidence does not show. If the value of such right is the proper measure of relief, the case should be referred to a master to hear and report such value.

III.

It is alleged in the joint answer of Easton, Walker, Tertius W. Wadsworth and Elijah K. Hubbard, that Easton and Carey, in making the contract with Goudy, represented and acted not only for Easton but for and in the interest of the defendants George Smith, Julius Wadsworth, Hugh T. Dickey, J. Milbank, Selah Chamberlain, William Rockefeller, J. Stillman, J. T. Woodward and E. L. Frank, and that the certificate for 875 shares, and the certificate for 7⅛ shares, were transferred to Easton as trustee for himself and those persons. That on the 20th of September, 1882, he surrendered said certificates, which were cancelled, and received instead thereof a certificate for 875 shares issued to him as trustee. That on the same day said certificate for 875 shares was surrendered by Easton and cancelled and new certificates of full-paid stock were issued to the parties named, each for 70 shares, and to Easton 50 shares, and to Easton as trustee for other parties 195 shares.

Fol. 156.

The parties named in their answer, which was filed May 21st, 1884, admit "that they are stockholders of the defendant, the Evanston Company."

Fol. 206.

Complainant filed exceptions to this answer upon the ground that it did not disclose the number of shares held by each of said defendants, etc. Afterwards the bill was amended and the amended bill alleged that it was pretended and claimed by the defendants, the North Chicago Company, Easton, Wadsworth, Dickey, Milbank, Stilman, Woodward, Frank, Rockefeller, Chamberlain and Smith, that transfer had been made in substance as alleged in the answer as above referred to, and further that it was pretended that the

capital stock had been increased and the increased stock delivered to such parties; that such pretended transfers were void, etc.

Fol. 227.

It was stipulated that the allegations of the amended bill should be considered as denied.

Fol. 231.

No evidence was given by defendant to show the number of shares held by the parties named. The case in that respect, standing upon the admissions in the pleadings, shows that the 875 shares and seven additional acquired by Easton were held by him and the parties named at time of trial.

IV.

It appears that a call upon such stock had been paid in full. Easton paid $87,500.

Fol. 602.

The evidence does not show how much of this money remained in the possession of the Evanston Company at the time of the commencement of this action. Before the action was commenced it repaired the track in the city, but when it made any payments on account of such work, or the amount of such payments, is not shown.

V.

Whatever the company did was the act of Easton and his associate directors. Whatever was done with the money or property, was done with knowledge of complainant's claim, and in the exercise of a wrongful control. Is not com-

plainant entitled to a decree requiring Easton and the parties whom he represented, to transfer to complainant 875-1000 of the capital stock of the company. He was entitled to that proportion of the 1000 shares, and should receive that proportion of the capital stock as it exists.

VI.

On the 6th of October, 1884, defendants Julius Wadsworth, Dickey, Frank, Stillman, James Woodward, E. L. Frank, George Smith, William Rockefeller and Selah Chamberlain were enjoined from disposing of their stock in the Evanston Company mentioned in their joint answer until further order of the court.

Fol. 224.

By stipulation of the Evanston Company, Easton, Walker, Wadsworth and Hubbard jointly and severally agreed to obey and perform or cause to be obeyed and performed all decrees or orders which might be rendered against them or any of them,—to pay and satisfy all sums which might be awarded the complainant by reason of such failure of performance, or by reason of any acts which would have been restrained if injunction had been issued and served. That the court might make a decree on the final determination of the case and upon such terms as it might adjudge to be necessary to protect all the equities of the complainant.

Fol. 71.

VII.

Is there an equity in defendants, holders of the stock, requiring payment by the complainant of any portion of the sum advanced upon the capital stock or in construction, less

rents and profits as a condition of its transfer to complainant? If so, it is not just that complainant should be compelled to make such payment as a condition to proper relief. Had the trust been executed, complainant would have acquired control of the Evanston Company without such payment. It is the act of defendants that has made such payment necessary, if it is required. Complainant should in any event have the option of accepting the transfer of the capital stock on condition of such payment, or in lieu thereof a decree requiring the payment by the defendants of the value of the property and franchise of the Evanston Company, or the control of that company, less $25,000, which complainant must have paid had he secured the control.

Jurisdiction in equity having obtained, the court will direct such a decree as is just. Complainant claims that it should have the transfer of 875-1000 of the stock of the company now outstanding, or if this has become inequitable or impossible by reason of the acts of defendants, that there should be a decree for damages, to be measured by the value of the franchise and property and control of the Evanston Company. In this view of the case it is unimportant whether the decree is against Easton and those whom he represented or against the Evanston Company. If Easton acquired title to the stock in good faith, then the decree should be against the Evanston Company.

M. D. GROVER,
Solicitor and Counsel for Complainant.

LAWS OF ILLINOIS—1859.

In Force Feb. 14, 1859.

Sec. 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, that Franklin Parmelee, Liberty Bigelow, Henry Fuller and David A. Gage, and their successors, be and they are hereby created and constituted a body corporate and politic by the name of the Chicago City Railway Company, for the term of 25 years, with all the powers and authority incident to corporations for the purposes herein mentioned.

Sec. 2. The said corporation is hereby authorized and empowered to construct, maintain and operate a single or double track railway with all necessary and convenient tracks or turnouts, sidetracks and appendages in the city of Chicago and in, on, over and along such street or streets, highway or highways, bridge or bridges, river or rivers, within the present or future limits of the South or West divisions of the city of Chicago as the common council of said city have authorized said corporations or any of them, or shall authorize such corporations so to do, in such manner and upon such terms and conditions, and with such rights and privileges as the said common council has or may be [have] directed that said parties or any or either of them prescribed; but said corporation shall not be liable for the loss of any baggage carried on said railways kept in and under the care of its owner, his servant or agent.

Sec. 3. The capital stock of said corporation shall be $100,000, and may be increased from time to time at the pleasure of said corporation. It shall be divided into shares of $100 each, and be issued and transferred in such manner

and upon such conditions as the board of directors of said corporation may direct.

Sec. 4. All the corporate powers of said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint. The first board of directors shall consist of said Franklin Parmelee, Liberty Bigelow, Henry Fuller and David A. Gage, and thereafter of not less than three or more than seven stockholders, who shall be chosen each and every year by the stockholders, at such time and in such manner as the said corporation shall by its laws prescribe. The said directors shall hold their offices until their successors are elected and qualified, and may fill any vacancies which may happen in the board of directors by death, resignation or otherwise. They may also adopt such by-laws, rules and regulations for the government of said corporation and the management of its affairs and business as they may think proper, not inconsistent with the laws of this State.

Sec. 5. The said corporation is hereby authorized to extend the said several railways herein authorized to be built in the manner aforesaid to any point or points within the County of Cook in this State, and to enable said corporation to construct any or all the railways therein authorized, or their appendages, the said corporation is hereby vested with power to take and apply private property for the purposes and in the manner prescribed in an act entitled, "An act to amend the law condemning right of way for purposes of internal improvement," approved January 22, 1852, and the several acts amendatory thereof, and may exercise all the powers conferred upon railroad corporations by the 25th and 26th sections of an act to provide for a general system of railroad incorporations, approved November 5, 1849, ascertaining and making recompense for all damages sus-

tained, agreeably to the provisions of the act hereinbefore first mentioned.

Sec. 6. The said corporation is hereby authorized, with the assent of the supervisor of any township, to lay down and maintain the said railway or railways in, upon, over and along any common highway in said township, but in such manner as not to obstruct the common travel of the public over the same. In all cases where vehicles shall meet the cars or carriages of the said railway either in the city or country said vehicle shall give way to the cars or carriages on the railway.

Sec. 7. All the rights and privileges granted or intended so to be to said Franklin Parmelee, Liberty Bigelow, Henry Fuller and David A. Gage, and their associates in and by the ordinances of the common council and the amendments thereto, are hereby in all things affirmed and shall pass to and become vested in the corporation hereby created.

Sec. 8. Nothing herein contained shall authorize the construction of more than a single track with the necessary turnouts, which shall only be at street crossings, upon State street between Madison and Twelfth streets, except by the consent of the owners of two-thirds of the property in lineal measurement lying upon State street between Madison and Twelfth streets aforesaid, nor shall anything herein contained be construed to authorize the company hereby incorporated to permit the cars of any railroad company whatever, propelled by steam, to be run along or upon the railroad of the company hereby incorporated.

Sec. 9. The said company hereby incorporated shall within two years from the passage of this act erect, maintain and operate two railways, one from Lake street to the southerly boundary of the city, and one from the south branch of the Chicago river, on Madison street, to the western

boundary of said city; and upon failure to do so, this act and all the privileges and franchises hereby conferred, shall cease and determine.

Sec. 10. All the grants, powers, privileges, immunities and franchises conferred upon, and all duties and obligations required of Franklin Parmelee, Liberty Bigelow, Henry Fuller and David A. Gage by this act, for the south and west divisions of the city of Chicago in county of Cook, are hereby conferred upon and required of William B. Ogden, John B. Turner, Charles V. Dyer, James H. Rees and Valintine C. Turner, by the name of the North Chicago City Railway Company, for the north division of said city and said county of Cook, as fully and effectually to all intents and purposes as if they had been by a separate act incorporated, with all of said grants, powers, privileges, immunities and franchises conferred upon them, and all of said duties and obligations imposed upon them, and the said last named corporation may take, hold, mortgage and convey real estate.

Sec. 11. This act shall be deemed a public act and noticed by all courts as such without pleading, and shall take effect from its passage.

Approved February 14, 1859.

Supreme Court U. S.
FILED.
MAR 24 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 246—October Term, 1890.

JAMES J. HILL, Appellant,

vs.

THE CHICAGO & EVANSTON R. R. CO.,
CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.,
NORTH CHICAGO CITY RAILWAY CO. et al.

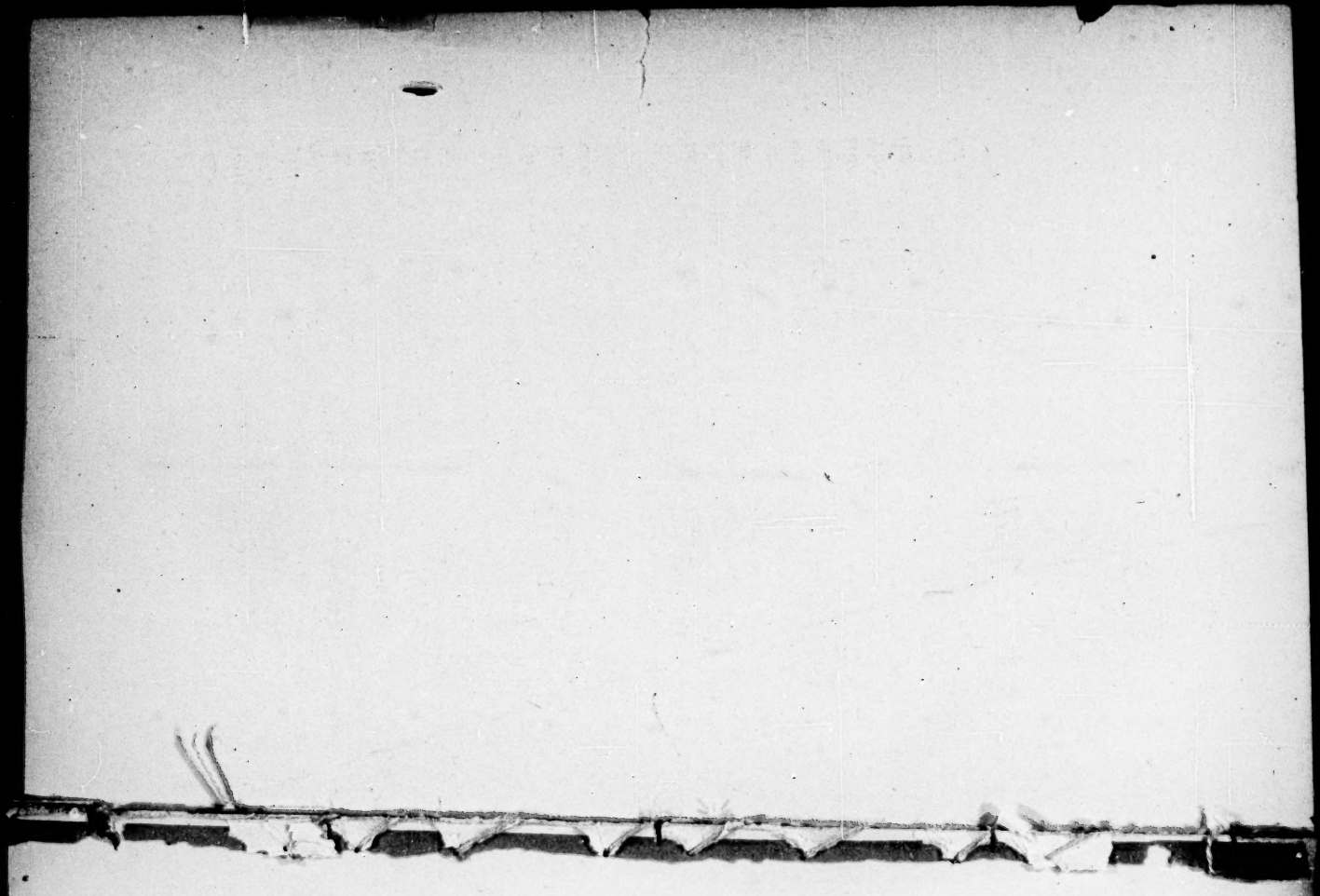
BRIEF AND POINTS FOR APPELLEES

WHO WERE NOT DISMISSED BY DECREE OF JUNE 8, 1885.

JOHN W. CARY,

Of Counsel for Appellees.

ED. KEOGH, PRINTER, 261-263 DEARBORN ST., CHICAGO.



Supreme Court of the United States.

OCTOBER TERM—1890.

JAMES J. HILL,
Appellant,
vs.
THE CHICAGO & EVANSTON R. R. CO.
CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.
NORTH CHICAGO CITY R'Y CO., *et al.*
No. 246.

BRIEF AND POINTS FOR APPELLEES,

Who were not Dismissed by Decree of June 8, 1885.

These appellees were the owner of the stock of the Chicago & Evanston Railroad at the time of the commencement of this action on the 17th day of November, 1882, and the directors of said company.

None of them had anything to do with the matters in controversy prior to the purchase made by Easton and Cary in August, 1882, and had no knowledge of the matters set up in the complainant's bill, and prior to that time had no knowledge of the pretended interest of Hill in the property.

The appeal by the complainant is from a decree of the Circuit Court of the United States rendered on the 14th of July, 1887. A full statement of the case is contained

in the brief filed by Mr. Jewett. It is not necessary therefore that a statement of the case at length should here be made and only so much thereof will be stated as is required for the points here presented.

The prayer of the bill of complaint asks that a certain transfer made by the North Chicago City Railway Company of 875 shares of stock of the Chicago & Evanston Railroad Company, together with a note of the Chicago & Evanston Railroad Company of $36,847 78 and the forfeiture of one hundred and ten and two-thirds shares of stock of said Evanston Company should be vacated and set aside and that said stock and note be delivered to the complainant, and that the Chicago & Evanston Railroad Company should register and cause to be transferred said stock on the books of said company to the complainant in accordance with its charter and by-laws.

It appears from said bill of complaint and the proofs in the case that 1,000 shares of said stock, being the whole thereof, and the note were on and prior to the 8th day of August, 1882, the property of the said North Chicago City Railway Company; that on the first day of July, 1882, the North Chicago City Railway Company agreed to sell all of its rights and interests in and to the said stock (the same being unpaid and subject to assessment for the full amount thereof), and the said promissory note to the defendant, Wm. C. Goudy, for the sum of $25,000 cash, said certificates of stock and note to be delivered to him upon the payment of said sum on or before the first day of October, 1882; that afterwards and on the 8th day of August, 1882, the said William C. Goudy agreed with the defendants, Jason C. Easton and John W. Cary, to cause to be transferred to them 889 shares of said

capital stock of the Chicago & Evanston Railroad Company, and to procure the resignation of the then directors of the company, and the election as directors of the persons named by said Easton and Cary; that said Easton and Cary were then informed that said shares of stock and promissory note belonged to the said North Chicago City Railway Company, and were held by it, and would not be delivered by said company until the sum of $25,000 was paid to said company for said shares of stock and note; that afterwards and on the 19th day of August, 1882, the said North Chicago City Railway Company at the request of said Goudy deposited in escrow with the Commercial National Bank of Chicago one of said certificates for 875 shares of stock and the said promissory note with directions to deliver the same to W. C. Goudy or Edwin Walker upon the payment of $25,000 on or before September 5th, 1882, and on the 5th day of September, the said Easton paid to said bank $25,000, and by the order of Goudy received said certificate of stock, and that said stock was afterwards distributed among the persons for whom it was purchased, to-wit: Jason C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, Selah Chamberlain, Wm. Rockefeller, J. Stillman, J. T. Woodward, E. L. Frank and George Smith, who at the time of the commencement of the suit were the owners of said stock and in possession of the Chicago & Evanston Railroad and Company. That said defendants or some of them were elected directors of said Chicago & Evanston Company and immediately thereafter commenced the construction of its railroad. That the full amount of said stock was called for and paid into the said company, and the road completed and put in operation, and that the assessment on the remaining one hundred and ten and two-thirds

shares was called for in pursuance of the by-laws of the company and on failure to pay said assessment were duly forfeited by the company.

The bill of complaint alleges that prior to the 8th day of August, 1882, to-wit: On the 28th day of May, 1880, A. B. Stickney & Company, entered into an agreement with the said William C. Goudy to purchase 875 shares of said stock of the Chicago & Evanston Company, evidenced by three certain agreements which are attached to the bill of complaint as exhibits, alleging that said contract was in force; that the purchase by Easton and Cary was a fraud upon the rights of A. B. Stickney & Company and was made for the benefit of the Chicago, Milwaukee & St. Paul Railway Company and with full knowledge by said Easton and Cary and all the defendants of the rights and equities of said A. B. Stickney & Company, and for that reason asks that as to said note and the said 875 shares of stock the purchase so made by Easton and Cary be set aside and vacated, and further claims that as to the said one hundred and ten and two-thirds shares of stock which was standing in the name of A. B. Stickney & Company, upon which nothing had ever been paid and which was forfeited under and by virtue of the by-laws and rules of the company, should be set aside and vacated as collusive and fraudulent, and that the present owner of all said stock should be decreed to transfer the same to the complainant who has succeeded to the rights of A. B. Stickney & Company, and that the directors and officers of the said Chicago & Evanston Company, and the other defendants, be enjoined from interfering with said railway or disposing of the stock thereof, and for general relief.

The defendants, S. S. Merrill, John Johnston and the

Chicago, Milwaukee & St. Paul Railway Company filed a disclaimer of all interest in the matter in controversy. A demurrer to the bill was first interposed by the other defendants and was overruled for the reason that said bill charged that said defendants conspired together to cheat and defraud the complainant of his rights and of the $20,000 he had paid Goudy on said contract.

All the defendants answered fully denying all fraud and collusion. Proofs were taken by all the parties. But no evidence was introduced showing or tending to show any conspiracy or fraud as charged in the bill of complaint or any attempt to defraud the complainant.

The case was brought on for hearing and argument before his honor Mr. Justice Harlan at the Circuit Court in May, 1885, and on the 8th day of June following, he filed his opinion and decision which is printed in the record at pages 117 to 123, and on the same day entered a decree therein as follows:

"This cause coming on for final hearing upon the pleadings, depositions and documentary evidence produced before the Court, and the cause having been argued by counsel, and the Court being sufficiently advised in the premises, it is ordered and decreed that the complainant's bill be dismissed for want of equity as against the defendants William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and The Chicago, Milwaukee & St. Paul Railway Company, with their costs to be taxed by the clerk. It is further ordered and decreed, that so much of the complainant's bill as relates to the certificate of one hundred and ten and two-thirds shares of the capital stock issued to A. B.

Stickney & Company, dated September thirtieth, 1881, be dismissed for want of equity.

It is further ordered and decreed, that all relief be denied to the complainant upon all matters and things in controversy herein except as to the amount of money paid by the defendant, William C. Goudy, for right of way in execution of the contract between him and A. B. Stickney May twenty-eighth, 1880, and for the purpose of ascertaining said amount of money, it is ordered that this cause be retained as to the other defendants, and that it be, and is hereby referred to Henry W. Bishop, one of the masters in chancery of this Court to take additional testimony as to such amount, and that he make report of the amount so paid, and that on the making of such report, such further decree will be rendered as may be equitable.

It is further ordered, that for the better discovery of the matters aforesaid, the parties are to produce before the said master upon oath, all deeds or books, papers and writings in their custody or power relating thereto, and are to be examined on oath as the said master shall direct."

And thereupon the complainant prayed an appeal to the Supreme Court, which was allowed on its filing a bond in the penal sum of five hundred dollars with provisions as required by law, and with security approved by the Court.

The case was then referred to the master who filed his report with the testimony on the 31st day of January, 1887; (Record, pp. 124, 125,) to which exceptions were filed by both complainant and defendants), and afterwards at the July term, 1887, the cause was further

heard by his honor Mr. Justice Harlan, and a decree entered as follows:

"This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, viz.: That the exceptions of both the complainant and the defendant, the Chicago & Evanston Railroad Company, to the report of the master in chancery filed herein on the thirty-first day of January, 1887, be and the same are hereby overruled and the said report approved and confirmed; that said Chicago & Evanston Railroad Company do forthwith pay unto said complainant the sum of sixty-five hundred and thirteen dollars, ($6,513), together with interest upon the same from the thirtieth day of January, 1887, at the rate of six per cent. per annum, and also the costs of said reference to the master, to be taxed by the clerk of this Court, and also the costs of this suit, for which plaintiff may have execution.

It is further ordered and decreed that all other relief prayed in the complainant's bill be denied as against said defendant The Chicago & Evanston Railroad Company, and that the complainant's bill be dismissed out of Court for want of equity as against the remaining defendants T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockefeller, Selah Chamberlain and George Smith, with their reasonable costs to be taxed by the clerk, and that they have execution therefor against the said complainant."

And thereupon the complainant prayed an appeal to the Supreme Court of the United States which was allowed

upon his filing a bond in the penal sum of Five Hundred Dollars, with provisions as required by law, and with security to be approved by the Court.

The appeal prayed in June, 1885, from the first decree was not perfected by the filing of the record therein to the Supreme Court, but at the October term, 1887, the appeals in both cases were docketed.

At the term of the Court in 1888, two motions were submitted in each case by the different defendants to dismiss said appeals, and the appeal from the decree of June, 1885, was dismissed as to all the defendants, on the ground that the transcript of the record of that decree was not filed in the Supreme Court at the October term, 1885.

The motions to dismiss the appeal from the decree of 1887 were denied, for the reason that it was not proper to decide on that motion whether the decree of 1885 was or was not a final decree.

The appeal, therefore, taken from the decree of June 8th, 1885, was not perfected and is not now before the Court, but only the appeal from the decree of July 1887, and such matters as are properly here for revision on that appeal.

I.

The decree of June 8th, 1885, was a final decree as to all of the defendants, denying all the equities of the complainant's bill, except as to the amount of money expended by Goudy in procuring the right of way of the Evanston Railroad, which amount was decreed to belong to the complainant, and to ascertain which a reference was made to the Master, and the suit was retained as to the Evanston Road and its directors and the owners

of its stock in order that it might enforce the payment of the amount so found due, but as to all the other defendants it was dismissed.

The only reason why the bill was retained as to any of the defendants was that payment of the amount so found to have been expended by Goudy might be enforced.

Had that amount been known the decree would have been against the Evanston Railroad Company for the payment thereof, and a dismissal of the bill as to all the other defendants.

The sole purpose of retaining the bill as to any of the defendants was to enforce the payment of this amount when ascertained.

Every other matter contained in the bill of complaint was fully adjudicated and the right of the complainant denied as against all the defendants; as much so against the parties who were retained, as against those as to whom the bill was dismissed.

The only matter reserved and for which the bill was retained against any of the defendants was the ascertainment of the amount that had been so paid and the enforcement of the payment thereof.

What shall constitute a final decree for the purpose of allowing an appeal under the acts of Congress has been repeatedly adjudicated by this Court.

In *Forgay et al vs. Conrad*, 6 How. 201, the decree declared certain deeds therein mentioned to be fraudulent and void, and directed the lands and slaves therein mentioned to be delivered up to the complainant, and also directed one of the defendants named in the decree to pay him $11,000 received from the bankrupt in fraud of his creditors, and that the complainant have execution for the several matters aforesaid in conformity with the law

and the rules of practice established by the Supreme Court of the United States; and further directed that the Master take an account of the profits of the land and slaves ordered to be delivered up, from the time of the filing of the bill until the property was delivered, or the date of the Master's report; and also an account of the money and notes received by one of the defendants; and further decreed, "And so much of the said bill as contains or relates to matters hereby referred to the Master for a report is retained for further decree in the premises, and so much of the said bill as is not now, nor has been heretofore adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs."

A motion was made to dismiss the appeal on the ground that it was not a final decree, and Chief Justice Taney in deciding said motion, said:

> "The question upon the motion to dismiss is whether this is a final decree within the meaning of the acts of Congress. Undoubtedly it is not final in the strict, technical sense of that term, but this Court has not heretofore understood the words 'final decree' in this strict and technical sense, but has given to them a more liberal, and as we think, a more reasonable construction and one more consonant to the intentions of the legislature."

The Chief Justice then cites the case of *Whiting vs. Bank of the United States*, 13 Peters, 15, "in which it 'was held, that a decree of foreclosure and sale of mortgaged 'premises was a final decree and the defendant entitled to 'his appeal without waiting for the return and confirm-'ation of the sale by a decretal order, and this decision 'is placed by the Court upon the ground that the decree of

'foreclosure and sale was final upon the merits and the 'ulterior proceedings but a mode of executing the original 'decree,'' and further says:

> "And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried into immediate execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this Court, although so much of the bill is retained in the Circuit Court as entitles the parties to an account pursuant to the decree passed."

In the case of *Bronson vs. Railroad Company*, 2 Black, 524, a motion was made to dismiss the appeal from a decree of foreclosure, on the ground that it was not a final decree for the reason that a cross-bill was pending, and other reasons.

The Court in denying the motion, say:

> "It is an independent proceeding instituted by certain lien creditors below, who were defendants in the original suit, seeking to invalidate a prior lien set up by Chamberlain and others in their answer," which was a matter that in no way affected the questions adjudicated between the plaintiff and defendant.

In *Bostwick vs. Brinkerhoff*, 106 U. S., 3, the Chief Justice says:

> "The rule is well settled, and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this Court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the Court below

would have nothing to do but to execute the judgment or decree it had already rendered."

In *Grant vs. Phoenix Insurance Co.*, 106 U. S. 429, this language is substantially repeated.

In this case the decree of June 8th, 1885, did terminate the litigation between the parties on the merits of the case so that nothing was left but to enforce the decree.

That decree provided that the money paid by Goudy should be recovered by the complainant, and in execution of that decree it was referred to a Master to ascertain the amount thereof.

No question was left to be subsequently decided and the reference was for the simple purpose of ascertaining the amount which the decree had ordered to be paid over to the complainant.

The decree was not in any sense an interlocutory one. If it had been intended as an interlocutory decree, and that the merits of the case could be inquired into, the bill would not have been dismissed as to any of the parties.

A hearing of this case on the merits without the defendants Goudy, the North Chicago City Railway Company, and perhaps other parties who were dismissed, could not have been had. There would have been a defect of parties.

Had the original bill of complaint failed to make them parties to the action it would have been impossible to have proceeded and set aside the sale made by them to Easton and Cary and deprived the persons subsequently becoming owners of the property through them, of their title.

An interlocutory decree may be altered or changed by the Court passing it at any time before final decree, but in such a case it would be necessary that all the necessary

parties to the suit should be retained until the final decree should be passed.

This decree is not in the nature of an interlocutory decree, but has the form and characteristics of a final decree.

The object of the bill of complaint was to set aside and vacate the sale through Goudy by the North Chicago City Railway Company of 875 shares of this stock and the promissory note of $36,000 to Easton and Cary, and to enforce the prior contract made by that Company for the same stock to the complainant or his assignor, and also to set aside and vacate the forfeiture of 110⅔ shares of stock by the Evanston Company.

This was the complaint of the bill. To it the answers were made and proofs taken, and this was the whole matter in litigation.

Goudy and the North Chicago City Railway Company were necessary parties to this contention, and without their presence the matter in relation to the 875 shares of stock could not have been litigated.

The decree directs, first, that the complainant's bill be dismissed as to Goudy, the North Chicago City Railway Company and several other defendants.

Second. That so much of it as relates to the 110⅔ shares of the capital stock be dismissed for want of equity.

Third. That all relief be denied to the complainant upon all matters and things in controversy herein, except as to the amount of money paid by the defendant, Wm. C. Goudy, for right of way in execution of the contract between him and A. B. Stickney & Co.

Fourth. That for the purpose of ascertaining that amount it be referred to a Master.

This is the language, not of an interlocutory, but of a final decree disposing of the whole merits of the case, and as we have already said, necessarily putting it beyond the power of the Court to further adjudicate upon the merits of the matter in controversy by the dismissal of several of the necessary parties to such consideration.

The case of *St. Louis, Iron Mountain & Southern R. R. Co. vs. Southern Express Co.*, 108 U. S., 24, is a decision directly in point.

That suit was brought to compel the Railroad Company to do the Express Company's business. The controversy was about the right of the Express Company to require this to be done on the payment of lawful charges. The matter in controversy was to establish the liability of the Railroad Company to carry.

The decree requires the carriage and fixes the compensation to be paid, adjudges costs against the Railroad Company and awards execution, but leave was given to the parties to apply for a modification of what had been fixed as lawful charges, and for this reason it was moved to dismiss the appeal as not being a final decree. The motion was denied, the Court holding that the decree was final.

This point has been adjudged in a great number of cases in this Court, but it is not necessary to repeat them here, as they are familiar to the Court and are nearly all cited in the brief of Mr. Jewett.

This decree being final, and not having been appealed from, cannot be reviewed on this appeal.

The appeal in this case brings up only such matters as

have occurred subsequently to the final decree rendered June 8th, 1885.

Any other rule would have the effect of extending the time of appeal from a final decree indefinitely. The statute provides that all such appeals shall be brought within two years.

The adoption of the practice here contended for would have the effect to extend the time of appeal from that final decree beyond the time allowed by law. The first decree was passed on the 8th day of June, 1885. The appeal from the second decree was taken on the 14th of July,, 1887. At that time all right of appeal on the final decree had passed.

Orders made in the enforcement of final decrees are doubtless in many cases appealable, but to hold that they have the effect of bringing up the final decree in the case for review would entirely do away with the limitation prescribed by statute for appeals and would be an unseemly practice to introduce.

The uniform decision of this Court has been that a decree of foreclosure and sale is a final decree, yet if the practice here contended for is to prevail, an appeal from the order of confirmation would have the effect to bring up the final decree for review, and that although the final decree may have passed years before the appeal from the order of confirmation.

In *Sage vs. Railroad Co.*, 96 U. S., 712, a final decree of foreclosure was entered on October 22d, 1875. On July 18th, 1877, the sale took place, which was confirmed on August 31st, 1877.

On the same day Sage and others appealed from the order of confirmation and also appealed from an order en-

tered on October 21st, 1875, the day prior to the decree of foreclosure and sale.

Motion was made to dismiss and Chief Justice Waite, in delivering the opinion of the Court, said:

> "It is clear that this appeal does not bring up for examination the orders of October 21st, 1875. Every proceeding in the cause which was prior to October 22d, 1875, (the day on which the final decree was entered) must be examined, if at all, under the appeal from the decree of that date still pending here."

This is a direct authority, not only that orders prior to a final decree cannot be reviewed on an appeal from a decree subsequent to such final decree, but also that such final decree cannot be reviewed on such subsequent appeal.

The doctrine that a final decree from which an appeal might be taken can be reviewed on an appeal taken from some other decree subsequent to it, has never had a place in chancery jurisprudence or in the practice of this Court.

If it is desired to question the correctness of a final decree in a Superior Court, an appeal must be taken from that particular decree according to the rules and practice of the Court; otherwise, such decree cannot be questioned, but must stand as the final adjudication of the Court upon that subject.

In the case of *Crosby vs. Buchanan*, 23 Wall, 420, 453, it is expressly recognized as the doctrine of this Court that the question whether or not a prior decree can be reviewed on a subseqent appeal depends wholly upon whether the prior decree was final, so that an appeal could have been taken therefrom.

By the uniform practice of this Court it has been held

that orders not final, affecting the merits of the controversy, can be reviewed on an appeal from a subsequent final decree, but it has never been held that a decree final in its nature could be reviewed or corrected on a subsequent appeal.

The appeal in this case, therefore, is confined wholly to the question as to whether the amount awarded to the complainant was correct, and in accordance with the final decree. There is no claim that there was any error in this respect, and the decree must therefore be affirmed.

Should the Court, however, hold that the merits of the case are open for consideration on this appeal, then it is respectfully submitted that there was no error in the decree of June 8th, 1885, and the alleged equities of the complainant were properly denied.

This question is fully argued in the brief of Mr. Jewett who appears for the parties who originally made the contract under which the complainant claims his rights, and who are parties to that contract. All the equities of the plaintiff were fully denied by those parties, and all knowledge of the existence of any such equities or pretended equities were denied by the defendants who were not dismissed by the decree of June 8th, and who subsequently became the owners of the property in question, and furnished the means for its construction, and there was no proof to sustain any of the material allegations of the bill showing any equities in the complainant's claim.

It is therefore submitted that on the merits of the case, if at this time open for consideration, the decree should be affirmed—

1st. Because the plaintiff's equities are denied, and the proofs do not sustain the allegations made.

2d. Because a Court of equity will not grant the relief prayed for, to-wit: the specific performance of an agreement for the sale of persona property where the case is destitute of fraud or conspiracy. The proofs entirely failed to establish the allegations of the bill in this respect.

It is not proposed however to discuss this question, as it has been very ably and fully presented in the accompanying brief.

JOHN W. CARY,

Of Counsel for the Appellees who were not dismissed by the decree of June 8th, 1885.

Office Supreme Court U. S.
FILED,
MAR 16 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 246.

JAMES J. HILL, *Appellant,*
vs.
THE CHICAGO & EVANSTON RAILROAD COMPANY ET AL., *Appellees.*

Appeal from the Circuit Court for the Northern District of Illinois.

ARGUMENT FOR APPELLEES DISMISSED BY DECREE OF JUNE 8, 1885.

JNO. N. JEWETT,
FOR APPELLEES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1890.

No. 246.

JAMES J. HILL, *Appellant*,
vs.
THE CHICAGO & EVANSTON RAILROAD COMPANY ET AL., *Appellees.*

Appeal from the Circuit Court for the Northern District of Illinois.

ARGUMENT FOR APPELLEES DISMISSED BY DECREE OF JUNE 8, 1885.

PART I.

STATEMENT.

Two decrees were entered in this case, one June 8, 1885, record, 123, and the other July 14, 1887, record, 153. An appeal was allowed from the first decree, *Ib.*, 124, but it was not prosecuted, and upon motion this appeal was dismissed, January 29, 1889. 129 U. S., 170. An appeal was allowed from the last decree, record, 154, and a motion was made to dismiss that appeal by the parties I represent, which was reserved for the final hearing. 129 U. S., 174; another motion was made to dismiss the appeal from the last decree by other parties, which was denied. *Ib.*, 175.

The only appeal, therefore, now pending in this court, is one from the decree of July 14, 1887. Counsel for appellant has assigned no errors as to this decree, and has not questioned it in his argument. The errors assigned relate to the decree of June 8, 1885, and the points made in the argument apply only to that decree. Speaking with more accuracy, the errors assigned are made to the *opinion* of Mr. Justice HARLAN, who heard the case on the circuit. The eleventh assignment is the only one referring to a *decree*, which is: "The court erred in dismissing the bill as to the defendants named in the decree for want of equity." As there are two decrees, from each of which an appeal was allowed, and by each of which defendants were dismissed, it can not be ascertained which is the one intended by counsel, except from his argument. The argument refers only to questions which could be considered on the hearing when the decree of June 8, 1885, was entered.

The point to be considered at the threshold is whether the decree of June 8, 1885, is now before this court. As already stated the appeal from this decree has been dismissed. The question is, does a second appeal from the subsequent decree of July 14, 1887, bring before the court the first decree for review?

A part of the defendants were dismissed from the suit, with their costs, by the decree of June 8, 1885. By that decree all relief was denied as to all of the defendants, except as to an amount of money, which the decree awarded to the complainant, and as to that a reference was made to a master to fix the amount, and for that purpose, a part of the defendants were retained. By the last decree of July 14, 1887, the defendants so retained were dismissed, except the Chicago and Evanston Railroad Com-

pany. That company was ordered to pay to complainant $6,513.

If the decree of June 8, 1885, is now before this court for review, for any purpose, are the defendants who were dismissed by it brought into this court by the appeal from the decree of July 14, 1887?

No reference has been made by counsel for appellant to these points or to the motions heretofore made. Before referring to the errors assigned and propositions argued, I will call attention to these preliminary questions:

A determination of the character of the decree of June 8, 1885, will decide these questions. If it is a final decree, it is not now subject to review.

It was treated as a final decree by the complainant, by praying an appeal. This court dismissed that appeal, because a transcript was not filed in time. By the decree William C. Goudy, Voluntine C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John De Koven, John J. Johnson, S. S. Merril, The North Chicago City Railway Company, and The Chicago, Milwaukee and St. Paul Railway Company were dismissed as parties to the suit for want of equity. Since that time a suit at law was brought by Hill and Stickney in the state court against Goudy, in which the defendant plead this decree as a bar, and the plea was sustained and judgment affirmed by the Supreme court of Illinois. 132 Illinois, 213.

These facts ought to be enough to establish the proposition that the decree was final as to the persons dismissed by it. They were not parties thereafter for any purpose, and the appeal from the subsequent decree of

July 14, 1887, could not bring up the decree of June 8, 1885, as to them, whatever might be the rule as to the persons retained as defendants.

But the appellees contend that this is a final decree as to all of the parties. The object of the suit was to compel a transfer of eight hundred and seventy-five shares of the capital stock of the Chicago and Evanston Railroad Company, on which nothing had been paid, and for which a receipt or certificate was held by some of the defendants, and in like manner other one hundred and ten shares, and to recover a promissory note for $36,847.48, executed by said company to the North Chicago City Railway Company, and to obtain a decree against the defendant Goudy for money paid to him under a contract set forth in the bill. The decree of June 8, 1885, not only dismissed the bill as to the defendants mentioned above, but it dismissed so much of complainant's bill as relates to the certificate for one hundred and ten shares for want of equity, and further *denied all relief to the complainant upon all matters and things in controversy in the case*, except as to the amount of money paid for right of way in execution of a contract. While there is no express order that this sum of money be paid, there is a clear implication that it should be paid to the complainant. Referring to the opinion, it is clear that this money was to be paid to him. The subsequent decree of July 14, 1887, was in execution of the decree of June 8, 1885, which finally determined all questions in controversy on the merits. The rights of the parties to the suit were settled by the first decree. In no sense is it interlocutory.

For the purpose of understanding the nature of the decree of June 8, 1885, it may be best to refer to the pleadings, issues, evidence and opinion of the trial judge, with the two decrees.

The bill set forth a certain contract made on the 28th day of May, 1880, which consisted of three parts, and all constituting the same transaction. A. B. Stickney & Co., composed of A. B. Stickney and James J. Hill, made an agreement with the Chicago and Evanston Railroad Company, agreeing to construct a railroad track from the city of Chicago to the south end of Calvary cemetery, a distance of about seven miles. Another agreement was made between Wm. C. Goudy and the Chicago and Evanston Railroad Company, by which he agreed to procure certain right of way over which the railroad track was to be constructed. Still another agreement, in writing, was made between A. B. Stickney & Co. with William C. Goudy, in which the latter agreed that he would perform the contract with the Chicago and Evanston Railroad Company; that he would cause to be assigned to John DeKoven, as trustee, eight hundred and seventy-five shares of the capital stock of said railroad company, and also a certain note for $36,847.48, given by said railroad company to the North Chicago City Railroad Company, and also all his rights to compensation for procuring the right of way, to be held in trust, for the purpose of delivering the same to said A. B. Stickney & Co. on the performance by them of their part of the contract, but in case of failure, to deliver the same to the said Goudy or his assigns. The contract provided for the payment by Stickney & Co. to Goudy of $20,000 in cash, and $35,000 in two installments, to be paid when the right of way should be procured. The contract further provided that if Stickney & Co. neglected to make either of the payments the contract might be declared ended, and all money paid, and rights under the contract, forfeited, and if default should be made by the said

Goudy so that the deferred payments should not become due and such default continue for three months after March 1, 1881, then upon payment by Stickney & Co. of $25,000 to DeKoven, the trustee, in lieu of said deferred payments, it should be the duty of DeKoven to assign the stock, note and claim to Stickney & Co., and that he also be entitled to recover from said Goudy such damages as they might sustain by reason of the default, not exceeding $35,000; but in case Stickney & Co. should neglect to pay $25,000 within four months after March 1, 1881, then DeKoven should transfer the stock, note and assignment to the said Goudy or his assigns.

The bill further alleges that DeKoven accepted the trust, that Goudy placed in his hands the certificate for the shares of stock, the promissory note and the assignment of the claim; that the cash payment of $20,000 was made, but that Goudy did not perform his part of the contract in procuring the right of way, and for this reason the deferred payments did not become due.

The bill further averred that on the application of Goudy the time for his performance was extended by agreement until the spring of 1882, and in making such agreement he represented all the parties interested in the transaction, and that thereby the time for making the alternative payment of $25,000 by Stickney & Co. was also extended, and that the said Stickney & Co. were not in default upon their part.

The bill further alleges that, notwithstanding these facts, the shares of stock were transferred to Easton and other of the defendants representing the Chicago, Milwaukee and St. Paul Railway Company, who took the same with notice of the rights of the complainant, and that the directors of the Chicago and Evanston Railroad

Company had been changed so as to place it in the control of the purchasers of the stock.

The bill also claimed that another block of stock of one hundred and ten shares, belonging to A. B. Stickney & Co., had been forfeited illegally by the company.

The bill also averred that the defendants, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, and John DeKoven, conspired together to defraud Stickney & Co. and the complainant, and induce them to enter into the contract and to pay the said sum of $20,000.

The bill also averred that Stickney had assigned his interest in the contract and matters in controversy to the complainant, Hill, and he offered to pay into court $25,000, to be paid to such defendant as might be entitled thereto.

The bill waives an answer under oath, and prayed that the transfer of the stock and note, and all forfeitures of the eight hundred and seventy-five shares, or one hundred and ten shares, be set aside, and that the same be transferred to the complainant, and the control of the railroad company given to him; that the railroad company be required to register the transfer of stock on the books, and that the title of the complainant in the property be quieted, and for general relief. (Rec., 2–26.) Answers were filed by the North Chicago City Railway Company (Rec., 46), the Chicago and Evanston Railroad Company (Rec., 65), and by William C. Goudy. (Rec., 81.)

Answers were also filed by the other defendants. It is sufficient to say that, while the execution of a contract was admitted, it was not the one alleged in the bill. Is-

sues of fact were made as to the material statements of the bill.

The bill sets forth three separate instruments executed on the same day as the contract from which the complainant claims the right to the certificates for shares of stock and the promissory note. The answers deny that these constituted the contract, but set up another separate instrument executed at the same time, *all four of which formed the contract.*

The fourth paper is an agreement between the North Chicago City Railway Company and William C. Goudy.

By this the railway company agreed to sell 890 shares of stock in the Evanston company and a promissory note of that company for $36,847.78 to Goudy for $25,000, the same to be assigned to John DeKoven, as trustee, to hold until $25,000 should be paid to him according to a contract between Stickney & Co. and Goudy, or until default in such payment as therein provided. If such payment should be made DeKoven was to transfer and deliver the shares of stock and note to Stickney, but if not then the same were to be delivered to Goudy, or his assigns, and the agreement was to be an order by Goudy to DeKoven to assign and deliver the certificate and note to the North Chicago City Railway in case the sum of $25,000 was not so paid to him as provided in the contract between Stickney & Co. and Goudy, to which reference was made for greater certainty. (Rec., 49.)

The bill sets out numerous facts, and seeks full and complete relief from a court of equity, such as might be justified by the facts so alleged. It appears that there were *four* contracts, separate in form, but constituting one agreement; that there was a trust created thereby and

property placed in the hands of a trustee; it was claimed that the control of a railroad corporation had been unlawfully transferred to some of the defendants, which control belonged to the complainant; that certificates of stock in the railroad company, belonging to the complainant, had been illegally canceled and forfeited; that the property placed in the hands of trustee had been wrongfully transferred to parties, contrary to the provisions of the trust, who in turn had sold the same to others of the defendants.

The specific relief prayed was:

1. That the transfer of the 875 shares of stock, and note and claim to Turner, and to Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson, and said pretended elections of said Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill as directors, and said Easton as president, and Wadsworth as secretary and treasurer of the Chicago and Evanston Railroad Company, be set aside and declared null and void.

2. That all proceedings for forfeiture of said 875 shares, or 110⅔ shares of stock, be set aside and declared null and void.

3. That Turner, Wadsworth, Easton, Walker, Hubbard, Merrill and Johnson be decreed to deliver, transfer and assign the 875 shares of stock and said note and claim, and the control of said Chicago and Evanston Railroad Company to Hill, and that the other defendants cause the same to be done, so far as they have the control thereof.

4. That the Chicago and Evanston Railroad Company register and cause to be transferred said stock on the books of the company to Hill in accordance with the charter and by-laws of the company.

5. That the title of Hill in and to the property be quieted.

6. That the defendants be perpetually enjoined from transferring, assigning or disposing of the stock, note or claim, to any other person than complainant, and that said defendants be enjoined from taking any possession, control or management of, or in any manner intermeddling or interfering with said Chicago and Evanston Railroad Company, its railroad or franchises, or any of its property, rights, interests or privileges; and that, in the meantime, a temporary injunction issue, during the pendency of the suit, so restraining and enjoining the defendants.

7. For other and further relief, and that the defendants and each of them be required to stand to, abide by and perform such further order, judgment, or decree as might be made against them.

An amended bill was filed (Rec., 111), making some additional defendants, who filed answers (Rec., 115).

Replications were filed, and evidence taken, by all the parties, and final hearing was had before Mr. Justice Harlan upon the pleadings and evidence, who delivered the opinion in writing, which is to be found in the record at page 117, and is as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

James J. Hill
vs.
The Chicago & Evanston Railway Co. *et al.*

MONDAY, June 8, 1885.

DECISION.

HARLAN, J.: It is hardly necessary in this case, I suppose, to make any very full statement of the facts, for they are of course in the mind of counsel, the case was so recently argued.

Briefly stated, the main object of this suit is to obtain a decree compelling the transfer and assignment to James J. Hill of certain shares of stock in the Chicago and Evanston Railroad Company. To that suit there are various defendants, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, D. K. Hubbard, Samuel B. Chase, Ebenezer Buckingham and John B. Johnston, of this state, J. C. Easton, the Chicago, Milwaukee and St. Paul Railroad Company, the North Chicago City Railway Company, the Chicago and Evanston Railway Company.

I am of the opinion that this suit must be dismissed as to the defendants, DeKoven, Turner, Chandler, Goudy, North Chicago City Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, for want of equity, with costs to each of those defendants. The grounds upon which that conclusion rest are these:

Mr. Goudy obtained a contract with the Chicago and Evanston Railway Company, under which it became his

duty to secure certain rights of way to the end that this railroad might be completed from a certain point in this city to Calvary Cemetery, beyond the limits of the city, in the town of Evanston. He was to receive $25,000 when he performed his part of that contract. On the same day a contract was entered into between A. B. Stickney & Co. and the Chicago and Evanston Railway Company, by which Stickney & Co. undertook the construction of that railway, and were to receive certain compensation from the company. On the same day Mr. Goudy made a contract with Stickney & Co., which contract is the one principally involved in this litigation, and by which the rights of the parties are to be determined. By that contract Goudy undertook that he would perform all the covenants and agreements contained in his contract with the Chicago and Evanston Railroad Co. He also agreed that he would cause to be properly assigned to DeKoven, as trustee, 875 shares of the capital stock of the Chicago and Evanston Railway Co., to be held by DeKoven in trust for purposes not necessary a present to be stated; and also cause to be properly assigned to DeKoven, as trustee, a certain note made by the Chicago and Evanston Railway Co. to the North Chicago City Railway Company. Observe, his agreement is to *cause* these assignments to be made. That arose from the fact alleged in the bill and abundantly shown by the testimony that those certificates of stock, and that that note *were, at the time of this agreement, the property of the North Chicago City Railway Company.*

Mr. Goudy undertook by that agreement to render certain professional services, which, as appears from the face of the contract, were to be directed to the end of securing the right of way for the construction of this

road. Mr. Goudy had become and had been for some while the owner of certain unimproved real estate in the neighborhood of Evanston and was concerned in these contracts with the road from the desire to have this road constructed so as to benefit his property.

In consideration of the premises, Stickney & Co. agreed as follows: That they would pay the sum of $55,000 in installments, $20,000 on the signing of this agreement to be paid to Mr. Goudy; in ten days after Mr. Goudy shall have performed and completed all of his agreements with the railroad company they were to pay $15,000 more; and sixty days after that payment the final payment of $20,000 was to be made. So that the first, the installment of $15,000, did not become due and payable until Goudy had performed his contract with the Railway Co. by securing these rights of way so the road could be constructed.

Now, it is provided in the contract that DeKoven should hold these shares of stock and this note in trust until either the party of the first part, which is Goudy, or the second part, Stickney & Co., shall be entitled to the delivery and possession of the same according to the terms of this contract. The $15,000 and the $20,000 were to be paid to DeKoven in trust for Goudy.

Now, if Stickney & Co. failed or neglected to make the payment of these two installments as prescribed in the contract, then the contract was ended, if Goudy so elected, and all the money and all rights under that contract were to be forfeited and might be kept by Goudy as liquidated damages, and DeKoven was to assign and transfer the shares of stock held by him to Goudy together with any money in his hands, including Goudy's claim for compensation under his contract with the Railway Co.

It is further agreed that if Goudy made default in the performance of his agreement, so that Stickney & Co. were not required to make the payments of $15,000 and $20,000, and such default shall continue for three months after the first of March, 1881, then Stickney & Co. were at liberty under the contract to pay $25,000 over to DeKoven as trustee, in lieu of the $15,000 and $20,000 payments; and thereupon it became the duty of DeKoven to assign to them the stock and the note, and they were entitled in that contingency to recover from Goudy such damages as they sustained by reason of such default not exceeding $35,000; but in case—and this is a material part of this case—" but in case said second party shall neglect to pay said $25,000 within four months after the 1st day of March, 1881, then DeKoven shall transfer said stock and deliver said note and assignment in his hand to the first party or his assigns." The materiality of that language is strengthened by a reference to the contract made the same day between Goudy and the North Chicago City Railway Company, by which the stock was placed in the hands—*not only placed in the hands of Goudy*, and he was authorized to deposit it with DeKoven in accordance with his contract with Stickney & Co., *but under the distinct agreement that if that $25,000 was not paid to the hands of DeKoven for the North Chicago City Railway Company, on or before the first day of July, 1881, then DeKoven, upon the production of the contract between Goudy and the North Chicago Railway Company, should hand that stock and note back to the North Chicago Railway Company.*

So, the case in brief then is this: Goudy undertook to so secure the right of way, and he had, until a certain period in 1881 to do it. If he did not procure that right

of way by the first day of June, 1881, then Stickney & Co. could step forward and pay $25,000 and obtain the stock and note; but if they did not pay $25,000 by the first day of *July*, 1881, then the stock and note were to be handed to Goudy or his assigns, and in this case his assigns would be the North Chicago Railway Co., because by his contract with that company the production of that contract was the order to deliver the stock back to them.

So Goudy failed to perform his part of the contract by the time allotted. Therefore, the payment of $15,000 and $20,000 from Stickney & Co. did not become payable, and Stickney & Co. failed to perform that act which by the terms of the contract was essential to entitle them to this stock and this note. It is alleged in the bill, and it is undoubtedly true from all the proofs, that these three contracts executed on the same day, and as to three of them, reference being made in each to all the balance, was one transaction, and that each paper is to be construed in the light of the other.

Now, if, on the second day of July, 1881, De Koven, the trustee, had refused to surrender this note and this stock to anybody, had determined to hold onto it until he was advised by the law what to do—if on that day the North Chicago Railway Co. had instuted its suit in equity, and made Goudy a party, DeKoven a party, Stickney & Co. a party, the Chicago and Evanston Railway Company a party, and these contracts were produced and laid before the court, there can be no doubt at all in my mind that by virtue of these contracts, the North Chicago Railway Company, *whom the bill alleges and whom the evidence shows to be, was the equitable owner of this stock and this note*, would have been entitled to a

decree requiring DeKoven to convey this stock and note over to it. Did it do anything after that day to forfeit its right in that regard? There is nothing in the evidence to show. Could Goudy do anything after that to deprive the North Chicago Railway Co. of the right to this stock and note? The only thing which it is alleged that he did in that direction was after the expiration of the time limited for Stickney & Co. to become the owners of this stock and this note, that he applied to Stickney & Co. for an extension of time in which to procure the right of way, and they assented to it, and that by mutual agreement between Goudy and Stickney & Co., the contract was thus extended.

If there were no other interests in the case involved than those of Goudy and Stickney & Co., there would be very great force in that objection; and undoubtedly after the first of July, 1881, Goudy was willing that the contract might be considered as standing between him and Stickney & Co; that was the feeling of both of them, and so continued, perhaps, until a late period perhaps, when Mr. Goudy became satisfied that Stickney & Co. were not going to do this work within proper time, and then informed them that he had no further control over the matter, and under the contract, the stock and the note belonging to the North Chicago Railway Co., their contract was at an end, and nothing further could be done without a new arrangement. Putting the evidence in the strongest light in that particular for Stickney & Co., and assuming that Mr. Goudy asked for an extension of time, and that Stickney & Co. agreed to it; yet that does not affect the right of the North Chicago Railway Co. to the stock on and after the first of July, 1881, and that company being informed of Mr. Goudy's purpose to obtain it

from DeKoven, gave notice to DeKoven that it was their property, exhibited the contract under which they were entitled to receive it, and they did receive it, *and the contract as between Stickney & Co. and Goudy, therefore, came to an end.*

It is argued in the case, however, that the subsequent proceeding to which Goudy was a party and the North Chicago Railway Co. was a party, and others were parties, tends to show that this was a mere pretense, this assertion of right on the part of the North Chicago Railway Co. It is quite true that after the original arrangement had thus been destroyed by the failure of Stickney & Co. to pay the $25,000—that after that was done and after the stock and note had gone into the hands of the Chicago and Evanston road, Goudy made a subsequent arrangement with the North Chicago Railway Co. by which he again acquired control of the stock and made a contract with Easton and Carey for the transfer to them. Undoubtedly the circumstances are such as to impose upon the court the duty to look narrowly into all of them, and so far as they are involved in that suggestion I have endeavored to do so, and I see nothing that affects at all the right in law and equity, for the North Chicago Railway Co. having recovered the stock and note, which they had the right to do under the contract, to make any arrangement that they might choose to make with Mr. Goudy in reference to it; and that, therefore, in this suit and under these circumstances there is no ground to question the validity of the contract between Goudy and Carey and Easton on the subsequent transfer of the stock.

The suit, therefore, must fail as to these parties unless it be as is claimed, that there is ground for a money de-

cree against Goudy with others in the suit. The only ground for a money decree that I can discover in this suit as against Goudy will arise out of his failure to procure the right of way within the time limited; for the contract provides that if he is in default as late as the first of June, 1881, that DeKoven might pay the $25,000 and recover from Goudy such damages as he has sustained by reason of such default. Without meaning to intimate any opinion upon the question whether any such damages may or may not be recovered in some other form of action, I am entirely clear that no such claim is at all germane to this suit. The object of this suit is simply to compel the transfer and assignment of this stock to Stickney & Co. To that issue Goudy is perhaps not a necessary party, because he was confessedly no longer the owner of that stock or had any interest in it, and the claim that Stickney & Co. may have if they have any for damages against Goudy for his failure to procure the right of way within the time limited is a cause of action for which there is a complete remedy at law, as to which there is no ground to come into a court of equity, and it is entirely foreign to the whole frame and scope of this suit. There is nothing in the case from beginning to end that indicates a purpose on the part of the pleader who framed the bill in this case to seek a money decree against Goudy. The specific relief asked is the transfer and assignment of this stock, followed by a prayer for general relief. I understand the rule to be that the court can not give relief under a general prayer which is inconsistent with a specific relief asked, and which is not within the frame and scope of the suit. I do not, therefore, see any ground for a money decree in this suit as between the plaintiff and Goudy; and the suit

as to the parties that I have named must be dismissed. It must also be dismissed as to the Chicago, Milwaukee and St. Paul Railway Co. They disclaim having any ownership in this stock or this property, and there is nothing in the record that shows that they have any interest. The case must go as to them. I think the bill must also be dismissed so far as relates to the certificate of 110⅔ shares of stock issued to Stickney & Co. on the 30th of September, 1881. That order is made because I see no escape from the conclusion that those certificates or the right to those certificates was forfeited by the Railway Co. in accordance with its by-laws.

But the suit as to the other defendants is retained and referred to a commissioner for the following purpose:

It is conceded in the case that the $20,000 which was paid to Mr. Goudy at the time of these negotiations was not simply paid as a part of the contract, but was paid to him to the end that he might use it to procure rights of way. The calculation was, to take all the agreements together, Stickney & Co. were to build this road and become the owners of the stock. That was the purpose of their engagement, and all the parties knew that from the face of these agreements; and that they might construct it and thus become the owners of this stock and this note, $20,000 of this $55,000 was placed in the hands of Mr. Goudy for the purpose of preparing the way to the construction of the road by procuring rights of way along the line. Well, he did to some extent. I infer from his testimony that the larger part of the $20,000 was expended in that way. I infer from the testimony that he was diligent in that direction; evidently miscalculated his power to obtain the right of way within the time limited by the contract, and he went as far as he could reason-

ably go, perhaps, within the time. But be that as it may, a large part of this $20,000 was expended by him to procure right of way, not for himself, but for Stickney & Co. Now, that right of way thus purchased by the money of Stickney & Co. is in the possession of this Railroad Co. and they have paid nothing for it to Stickney & Co. or their assignee, Hill, and it does not accord with my sense of justice to say or to hold that the money of Stickney & Co. thus invested in this right of way should go to the benefit of this Railroad Co. without their paying for it, and that is a matter between the complainant and the the railroad company. That right of way which may have been involved in the contract between Goudy and Easton and Carey was not in any legal or equitable sense the property of Mr. Goudy; in the purchase of it he was the representative of Stickney & Co. and there was enough in this case to put those who last contracted with Mr. Goudy upon the inquiry as to the extent of interest which Stickney & Co. had in that regard. If they had known all that did actually occur, I do not think they would be affected by any consideration in the case, other than that which arises from the fact that they are in possession of, and using a right of way purchased with the money furnished by Stickney & Co. to Mr. Goudy for that purpose. But I incline to the opinion that in this suit, which is to obtain the transfer of that stock to Stickney & Co., and for general relief, that it is within the scope and general purpose of this suit, as the court cannot give a decree to that effect, is to give them a money decree to the extent that under the proof, it appears that the defendants are in possession of the right of way which was paid for by their money. I think this case, therefore, must go to the commissioner to ascertain and report the amount paid by Mr. Goudy for

the right of way, in execution of the contract between him and A. B. Stickney & Co., of May 28, 1881. On the coming in of that report, such further decree will be rendered as may be equitable and proper. And I incline to think now that that decree probably would be a lien against the Chicago and Evanston railroad, but it is not necessary to determine that now. As to all the defendants except the ones that I have named, the case would be retained for the coming of that report.

Endorsed.

Filed June 8, 1885.

WM. H. BRADLEY, *Clerk.*"

On the 8th day of June, 1885, a final decree was rendered (Rec., 123).

"This cause coming on for final hearing upon the pleadings, depositions and documentary evidence produced before the court and the cause having been argued by counsel, and the court being sufficiently advised in the premises, it is ordered and decreed that the complainant's bill be dismissed for want of equity as against the defendants, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and the Chicago, Milwaukee and St. Paul Railway Company, with their costs to be taxed by the clerk. It is further ordered and decreed that so much of the complainant's bill as relates to the certificate of one hundred and ten and two-thirds shares of the capital stock issued to A. B. Stickney & Company, dated September 30, 1881, be dismissed for want of equity.

"It is further ordered and decreed that all relief be

denied to the complainant upon all matters and things in controversy herein, except as to the amount of money paid by the defendant, William C. Goudy, for right of way in execution of the contract between him and A. B. Stickney & Company, of May 28, 1880, and for the purpose of ascertaining said amount of money it is ordered that this cause be retained as to the other defendants, and that it be and is hereby referred to Henry W. Bishop, one of the masters in chancery of this court, to take additional testimony as to such amount, and that he make report of the amount so paid, and that on the making of such report such further decree will be rendered as may be equitable.

"It is further ordered that for the better discovery of the matters aforesaid, the parties are to produce before the said master upon oath all deeds or books, papers and writings in their custody or power relating thereto, and are to be examined on oath as the said master shall direct.

"And thereupon the complainant prays an appeal to the Supreme court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law and with security to be approved by the court."

On the 14th day of July, 1887, the master in chancery having made a report in pursuance of the directions of said decree, and exceptions having been taken thereto by both parties, the court entered the following decree (Rec., 153):

"It is ordered, adjudged and decreed as follows, viz.: that the exceptions of both complainant and defendant, the Chicago and Evanston Railroad Company, to the report of the master in chancery filed herein on the 31st day of January, 1887, be and the same are hereby over-

ruled and the said report approved and affirmed; that said Chicago and Evanston Railroad Company do forthwith pay unto said complainant the sum of six thousand five hundred thirteen dollars, together with interest upon the same from the 30th of January, 1887, at six per cent., and also costs of said reference to the master, to be taxed by the clerk of this court, and also the costs of this suit for which plaintiff may have execution.

"It is further ordered and decreed that all other relief prayed in the complainant's bill be denied as against said defendant, the Chicago and Evanston Railroad Company, and that the complainant's bill be dismissed out of court for want of equity as against the remaining defendants, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodword, E. L. Frank, William Rockafeller, Selah Chamberlain, and George Smith, with their reasonable costs, to be taxed by the clerk, and that they have execution therefor against the said complainant."

"And thereupon the complainant prays an appeal to the Supreme court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law, and with security to be approved by the court."

The object of the bill clearly appears and is disclosed by the prayer. It seeks 875 shares of stock of the Chicago and Evanston Railroad Company, and a promissory note under a contract set up in the bill, and 110 and two-thirds shares from the company itself, which it is alleged have been illegally forfeited. The bill asks that these shares of stock be transferred and assigned to the complainant, and having received such shares, the same be-

ing a majority of the capital stock, that the control of the company itself be placed in his hands. In aid of such relief an injunction is asked. There is no other specific relief sought, but there is prayer for general relief. The defendants were divided into five or six classes. The Chicago and Evanston Railroad Company itself and the persons who were directors at the time the bill was filed —Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill—who, it is alleged, held the stock sought, and were directors of the company, were one class, and the only defendants against whom the specific relief was sought. Stickney and Goudy, as parties to the contract under which the claim was asserted to the shares, were also made parties, and constituted another class, but no specific relief was asked against either, and no claim was asserted for a decree against Stickney. The only decree sought againet Goudy was for money, under the prayer for general relief. Another class consisted of Goudy, Turner, Chandler, Chase, Buckingham, who had been directors of the Chicago and Evanston Railroad Company, but no decree of any kind was asked against them. Still another class consisted of DeKoven, who was the trustee under the provisions of the contracts set out in the bill, holding the 875 shares of stock, and which he had surrendered. Still another class consisted of the North Chicago City Railway Company, which was the real owner of the 875 shares when the contract was made, and to which the shares were returned by DeKoven, as provided in the contract. Still another class was the Chicago, Milwaukee and St. Paul Railway Company, for which company it was alleged Easton and others held the stock in trust.

The result was the decree entered June 8, 1885.

This decree dismissed the bill for want of equity against Goudy, Turner, Chandler, Chase, Buckingham, Johnson, Merrill, the North Chicago City Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, with their costs to be taxed by the clerk.

This was the end of the case after a trial upon the merits, against all of these defendants. They ceased to be parties, and had judgment for their costs against the complainant. They were not before the court for any purpose after the date of that decree. If that is not a final decree as to such defendants, it would be difficult to find one.

The decree went further, and ordered that the bill be dismissed so far as it related to the 110 2-3 shares of stock. That was the end of the suit, so far as related to such shares, and as to all of the defendants in the case.

The decree went further, and denied *all relief* to the complainant upon *all matters and things in controversy therein;* except as to the amount of money mentioned in the decree; that was certainly the end of the suit as to the specific relief sought by the bill. It was also the end of the suit as to relief sought under the prayer for general relief as to all of the defendants, except as to such amount of money. For the purpose of ascertaining that amount, the case was retained as to the Chicago and Evanston Railroad Company and the persons who were then its directors. Most clearly, the decree was final and the suit ended as to everything in controversy in the suit, except the amount of money which was to be fixed when a further decree was to be entered as to that.

It is true that when the subsequent decree was entered fixing the amount to be paid and awarding execution

therefor, the decree repeated the statement of the former decree, that all other relief prayed for in the bill be denied as against the defendants still remaining in the suit, and that the bill be dismissed out of court as against all of the remaining defendants except the Chicago and Evanston Railroad Company against which the money decree was entered. The repetition of such denial of relief did not qualify or diminish the force of the decree of 1885.

On this state of facts it is claimed:

First. That the decree of June 8, 1885, was final as to the defendants who were then dismissed and an appeal could have been taken by the complainant and the case reviewed in this court. Such an appeal was prayed and allowed upon condition of filing a bond; but no transcript was filed for more than two years after the date of such decree and, therefore, the appeal was dismissed as against all of the defendants who were dismissed from the suit by the decree of June 8, 1885.

Second. That the decree having denied all relief asked by the bill, both specific and general, as against all of the defendants except as to the amount of money to be ascertained on reference to the master, was final as to all the matters in controversy except such amount of money, which was to be allowed under the prayer for general relief. The court decided by the decree that the complainant was entitled to that sum of money from the Chicago and Evanston Railroad Company, and nothing remained but to fix the amount and order its payment. It is insisted, therefore, that an appeal might have been taken by the complainant from such decree, and that it was final as to all matters except as to the amount of money. The appeal from the decree of June 8, 1885, was dismissed as to

defendants retained by that decree as well as the defendants who were then dismissed.

Third. As the decree of June 8, 1885, was final, and might have been brought to this court on review on the appeal then prayed and allowed, it cannot now be reviewed upon an appeal taken from the decree rendered July 14, 1887, which decree was merely in execution of the former decree.

POINTS AND AUTHORITIES.

I.

THE DECREE OF JUNE 8, 1885, WAS A FINAL DECREE FROM WHICH AN APPEAL COULD HAVE BEEN PROSECUTED.

A decree is final which terminates the litigation, between the parties, on the merits upon the question in controversy, leaving nothing to be done except to enforce the order, or execute its directions.

These principles have been settled by repeated decisions of this court.

In *R. R. Co.* v. *Express Co.*, 108 U. S., 24, the express company filed a bill for injunction against the railway company, to enjoin it from interfering with or disturbing the express company in the enjoyment of its facilities for the transaction of express business over the railway company's railroad. The court entered a decree, laying down the law applicable to the case, and enjoined perpetually the railway company from interfering.

It also found the regulations to be observed by the express company, and also provided that complainant could apply for an order to refer the cause to a master, to take proofs for the purpose of determining what amounts the railway company had in the past unjustly charged the express company and which should be refunded. The railway company appealed from that decree, and the express company afterward obtained an order referring the cause to a master. The express company, in this court, made a

motion to dismiss that appeal on the ground that it was not a final decree.

That motion was denied.

This court *held*, citing *Bostwick* v. *Brinkerhoff*, 106 U. S., 3, and *Grant* v. *Phœnix Ins. Co.*, 106 U. S., 429, that a decree is final, for the purposes of appeal, when it terminates the litigation between the parties, on the merits, and leaves nothing to be done but enforce by execution what has been determined.

2. That matters relating to the administration of the cause, and accounts to be settled in accordance with the principles fixed by the decree are incidents of the main litigation which may be settled by supplemental order after final decree.

In *Forgay* v. *Conrad*, 6 How., 201, it was *held* that where a decree decides the right to property and directs it to be delivered up or sold or a sum of money to be paid, and the complainant is entitled to have such decree carried into effect, this is a final decree from which an appeal lies, although there may be a reference to the master, and the bill retained for a further decree in pursuance thereof.

In *Whiting* v. *Bank of U. S.*, 13 Pet., 15, it was *held* that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by decretal order.

The same rule was laid down in *Michoud* v. *Girod*, 4 How., 503.

In *Thomson* v. *Dean*, 7 Wall., 342, the controversy was as to the ownership of certain shares of stock.

The decree directed Dean to transfer upon the books

therefor, the decree repeated the statement of the former decree, that all other relief prayed for in the bill be denied as against the defendants still remaining in the suit, and that the bill be dismissed out of court as against all of the remaining defendants except the Chicago and Evanston Railroad Company against which the money decree was entered. The repetition of such denial of relief did not qualify or diminish the force of the decree of 1885.

On this state of facts it is claimed:

First. That the decree of June 8, 1885, was final as to the defendants who were then dismissed and an appeal could have been taken by the complainant and the case reviewed in this court. Such an appeal was prayed and allowed upon condition of filing a bond; but no transcript was filed for more than two years after the date of such decree and, therefore, the appeal was dismissed as against all of the defendants who were dismissed from the suit by the decree of June 8, 1885.

Second. That the decree having denied all relief asked by the bill, both specific and general, as against all of the defendants except as to the amount of money to be ascertained on reference to the master, was final as to all the matters in controversy except such amount of money, which was to be allowed under the prayer for general relief. The court decided by the decree that the complainant was entitled to that sum of money from the Chicago and Evanston Railroad Company, and nothing remained but to fix the amount and order its payment. It is insisted, therefore, that an appeal might have been taken by the complainant from such decree, and that it was final as to all matters except as to the amount of money. The appeal from the decree of June 8, 1885, was dismissed as to

defendants retained by that decree as well as the defendants who were then dismissed.

Third. As the decree of June 8, 1885, was final, and might have been brought to this court on review on the appeal then prayed and allowed, it cannot now be reviewed upon an appeal taken from the decree rendered July 14, 1887, which decree was merely in execution of the former decree.

of the company a certain number of shares to each of two plaintiffs, and also directed that an account be taken and stated as to what was paid, and to be paid, for the stock, etc.

This court held that this was a final decree, from which an appeal could be prosecuted.

In *French* v. *Shoemaker*, 12 Wall., 97, it was *held:*

Where a case came to hearing on the bill, answer and replication, and on the cross-bill answer and replication, and upon the proofs, and the court found "that the equity "of the case is with the complainant," and that the defendant be enjoined, etc., and that he pay costs, the decree was final, although leave was given at the foot of the decree for either party to apply for such further order as might be necessary to the due execution of the same, or as might be required in relation to any matter not finally determined by it.

The following additional cases in this court also lay down principles similar to those determined by the above quoted decisions.

Barnard v. *Gibson*, 7 How., 650.
R. R. Co. v. *Swasey*, 23 Wall., 405.
Green v. *Fisk*, 103 U. S., 518.
Bronson v. *R. R. Co.*, 2 Black., 524.
Stovall v. *Banks*, 10 Wall., 583.

That where a decree is final as to some parties, although not as to others, an appeal lies as to those whose interests are finally determined, has been decided a number of times by this court.

Very early, in the case of *Todd* v. *Daniel*, 16 Pet., 521, it was decided that one defendant might appeal if he have a severable interest.

The same doctrine is laid down in *Forgay* v. *Conrad*, 6 How., 201.

In *Withenbury* v. *U. S.*, 5 Wall., 819:

Several libels were filed in that court for the condemnation, as prize of war, of large quantities of cotton and other property captured on the interior navigable waters of the United States, or on land adjacent thereto. On motion, these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libeled. Among these claims was that of Withenbury & Doyle. They denied the validity of the capture, and insisted on their title to 935 bales of the cotton. The claim was dismissed on hearing.

An appeal was taken, and a motion for dismissal was made on ground that the libel as consolidated, was not disposed of, and therefore the decree was not final.

But the court held it was final as to these parties, although not disposed of as to others, and that they had the right to appeal.

The COURT said:

"The appeals in the Bermuda case, and in the case of the Alexander cotton, were of the same character with that now before us. In neither of these cases had all matters arising upon the libel and the claims been finally disposed of. In the first, the appeal was by claimants of part of the property libeled whose claims had been dismissed, and the property claimed by them condemned. In the other the appeal was by the United States from a decree of restitution in favor of a claimant of part of the property libeled, in the same consolidated cause from a decree in which against another claimant, the appeal which we are now asked to dismiss was taken.

"It is true, that in the cases just referred to no question of jurisdiction was made at the bar, but it existed necessarily in each cause and was practically determined in favor of the jurisdiction, and, as we still think, rightly determined."

In *Germain* v. *Mason*, 12 Wall., 259, it was *held*:

1. Though several defendants may be affected by a judgment or decree there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants.

2. A judgment *in personam* against one defendant for a sum of money, which at the same time establishes the debt as a paramount lien on real estate as to other defendants, may be brought to this court by the party against whom the personal judgment is rendered without joining the others.

In *Milner* v. *Meek*, 95 U. S., 252, it was *held:*

Where a decree determined the amount and priority of respective liens, an appeal therefrom will not be dismissed on the ground that it was taken by one lien creditor only, if it brings up so much of the case and such of the parties as are necessary for the determination of his rights.

II.

THE APPEAL FROM THE DECREE CONFIRMING THE MASTER'S REPORT CANNOT BRING UP FOR REVIEW ANY QUESTIONS EXCEPT THOSE WHICH WERE DECIDED SINCE THE FINAL DECREE OF JUNE 8, 1885.

The decree of June 8, 1885, being a final decree, from which an appeal could have been perfected, and the appellant having failed to prosecute an appeal from that decree, and it having been dismissed, he cannot, upon an appeal from the order of the court confirming the master's report, attack the validity of that decree which he has acquiesced in.

In the case of *Turner* v. *Farmers Loan & Trust Co.*, 106 U. S., 552, a suit for foreclosure of a mortgage, commenced in a State court, was removed to the Circuit court, where a motion to remand it was made and overruled. A final decree in favor of the complainant was passed, whereunder the mortgaged property was sold. From the order confirming the sale an appeal was taken.

It was *held*, that the final decree, not disclosing a want of jurisdiction of the court below as to subject-matter, or parties will be examined here only to ascertain whether the sale conformed to its provisions.

There were numerous assignments of error besides the one of jurisdiction, but the court held that none of them could be inquired into except those relating to the sale.

In this case the facts were: Turner and others commenced a suit against I. B. and W. Railway Company, the Farmers Loan and Trust Company and others, for a foreclosure of several mortgages. The Farmers Loan

and Trust Company as trustee, filed a cross-bill for foreclosure of mortgages as prior liens. July 18, 1877, a final decree was entered ascertaining the amounts due to the Farmers Loan and Trust Company, and requiring the Railway Company to pay such amount, $6,234,625 within twenty days, and in default that the equity of the defendants in the cross-bill be barred and foreclosed and the property be sold. The sale occurred October 30, 1878, and was reported. December 23, 1878, an order was entered confirming the sale. February 3, 1879, Turner and others prayed an appeal from the final order confirming the sale. The appeal was allowed and a bond filed.

On this state of facts this court held that the first decree was not before them for review, but only the order approving the sale, and declined to decide any question which was based on alleged error in the decree of July 18, 1877.

In *Sage* v. *R. R. Co.*, 96 U. S., 712, Waite, C. J., had decided the same way as Justice Harlan in the above case. In this case a decree was entered October 22, 1875, for the foreclosure of a mortgage, by consent, an appeal taken and *supersedeas* granted. On motion in this court the *supersedeas* was vacated, but the appeal was allowed to stand.

See 93 U. S., 412.

After the *supersedeas* was vacated the sale was had and the order confirming the sale entered August 31, 1877. On the same day the same parties whose appeal from the decree of 1875 was pending, prayed an appeal to this court "from certain orders entered in the cause October 21, 1875, and from the decree of confirmation

and each and every other order made in the cause August 31, 1877." The appellees move to dismiss.

On page 714, WAITE, C. J., says:

"It is clear that this appeal does not bring up for examination the orders of October 21, 1875. Every proceeding in the cause which was prior to October 22, 1875, must be examined, if at all, under the appeal from the decree of that date still pending here."

In *Buffington* v. *Harvey*, 95 U. S. 99, BRADLEY, J., says:

"This is an appeal from a decree sustaining a demurrer to a bill of review, and dismissing the bill, the effect of which is to leave the decree in the original cause in full force and effect. *The only* questions open for examination on this appeal are such as were open on the bill of review, and these, as shown in *Whiting* v. *Bank*, 13 Pet., 6, and *Putnam* v. *Day*, 22 Wall., 60, were only such as arose upon the pleadings proceedings, and decree, without reference to the evidence in the cause. The decision of the court upon the issues of fact, so far as they depend upon the proofs are conclusive on a bill of review."

In *Orchard* v. *Hughes*, 1 Wall., 76, the converse of the principle of the above two cases was affirmed, namely, that in order to review a decree of confirmation of a sale, an appeal must be taken from that decree, notwithstanding the fact that an appeal is taken from the decree of foreclosure and sale.

In *Porter* v. *Pitts. Bess. Steel Co.*, 120 U. S., 677, the principle is recognized, although not applied under the facts.

BLATCHFORD, J., says: "It has been contended for the appellees that the appeals by Porter now under consider-

ation are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final decree; that the errors which Porter now insists on were errors committed in entering the decree of February 16, 1886; that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

"It is sufficient answer to these contentions to say that the decree of February 16, 1886, though a final decree of foreclosure and sale as respected the interests of the mortgagor, and in some other respects was not a final decree in respect of the matters involved in these appeals, etc.".

In *Crosby* v. *Buchanan*, 23 Wall., 453, this same question was raised by counsel and passed on by the court.

A decree was rendered in 1853, and another in 1872, from which an appeal was taken. Counsel for appellees claimed that the appeal did not bring up matters prior to 1853 because the decree of that year was final, and no appeal was prayed from it.

The court held that the decree of 1853 was not final, and therefore the appeal from the decree of 1872 brought up the whole case. The language of the court and this decision seems, by inference, to lay down that if the first decree is final, so as to support an appeal, and no appeal is taken from it, matters prior thereto cannot be inquired into on an appeal from a subsequent decree.

So in the case at bar, as we contend, the decree of

June 8, 1885, having settled *all* the rights of *all* of the parties, was a final decree, and it is brought directly within the reason of the rule as laid down in *Turner* v. *Farmers Loan & Trust Co.* Therefore, the appeal from the decree confirming the master's report cannot bring up for review the propiety of the decree rendered June 8, 1885.

PART II.

THERE IS NO ERROR IN THE DECREE OF JUNE 8, 1885.

If the court holds that the appeal from the decree of July 14, 1887, brings up the decree of June 8, 1885, for review in this court as to any of the defendants in the Circuit court, it will then be necessary to consider the errors assigned by the appellant as to that decree.

The first four assignments are based on the proposition that the North Chicago City Railway Company could not own and hold stock in the Chicago and Evanston Railroad Company.

The question before the court was the right of the complainant, Hill, to the stock under and by virtue of the four instruments of writing dated May 28, 1880. If Mr. Goudy did not own the stock, Hill acquired no right to it. It is immaterial whether the North Chicago City Railway Company owned it or not. It is beyond dispute that, while these shares of stock stood on the books in the names of Goudy, Chase, Buckingham, Turner and others, they did not own them, but the shares were held by them as trustees for the railway company; and Stickney and Hill had notice of that fact. If there was a want of legal power for the railway company to be a stockholder in the Evanston corporation, that would not place the ownership, with the right of disposal, in Goudy. In such a case, the ownership would probably remain in the persons who made sale to the railway company.

But there is no such question presented in this record. It was not raised by the bill. It was not urged in argument, nor decided by the court.

As Hill claims title through and under the railway company, the proposition of his counsel now cuts up his claim for relief by the roots.

But independent of all other considerations, there is no evidence in this record that the railway could not be a shareholder in another corporation. It may be admitted that a corporation cannot be a stockholder in another without express authority from the legislature. But there is nothing in this record to show a want of such power.

Counsel for appellant has printed, at the end of his argument, an act of the legislature of February 14, 1859, which purports to be an act incorporating the Chicago City Railway Company and the North Chicago City Railway Company. But that act was not offered in evidence, nor was the attention of the court called to it. The act is not in the record. As a matter outside the record there are other acts of the legislature granting powers to this corporation.

The other assignments of error may all be covered by the eleventh, by which it is claimed that the court erred in dismissing the bill; and this requires an examination of the pleadings and evidence.

Statement of the Evidence.

UNDISPUTED FACTS.

The Chicago and Evanston Railroad Company was incorporated by a special act in 1861, and authorized to construct and operate a railroad from Chicago to Evanston. The capital stock was fixed by the charter at $100,000, which was increased in 1864 to $300,000 and decreased to $100,000 in 1877. Originally there were subscriptions of stock, represented by issuing certificates to each subscriber, which were changed from time to time as the rights were transferred, which recited *no money had been paid*, and that upon payment the holder would be entitled to a certificate of stock. No payment was made on these certificates prior to the 5th day of September, 1882. (Rec., 172.) A copy of the certificate appears on pages 82, 285, 330, 338. In 1865 the North Chicago City Railway Company purchased of these shares of stock, and the certificates were assigned or issued to certain individuals who held the same for the use of that company. (Rec., 172.) None of these persons had any interest in the stock. Among them was Goudy, but he was not the owner of any stock in his own right and simply held certain shares or certificates for the railway company. (Rec., 174, 274, 256.)

The railroad company had acquired certain rights of way by an ordinance of the city of Chicago, passed August 17, 1864, and another in 1872, under which certain tracks had been laid in 1874 on Hawthorne avenue, jointly with the Chicago and Pacific Railroad Company, and tracks had been laid about the same time from the northern terminus of the track just mentioned to the city

limits; and there were certain rights in all of the tracks to be laid by the Chicago and Pacific Railroad Company, on the payment of one-half of the cost. (Rec., 175 and 305.) The distance in the city was about two and one-half miles; from the city limits to Calvary cemetery, about seven miles; to the point in Evanston, which was the terminus, about two and one-half miles more.

There was a debt due from the Evanston Railroad Company to the North Chicago City Railroad Company of $36,847.78, which stood in an open account on their books, and arose for moneys advanced by that company for the use of the Evanston company. A promissory note for that sum was executed by the Evanston company to the North Chicago City Railway Company. (Rec., 178 and 223.)

Goudy was a director and president of the Chicago and Evanston Railroad Company, attended to its law business, and was paid for his legal services by the North Chicago City Railway Company. In 1873, while it was expected the road would be built after the passage of the ordinance of 1872, he purchased on the line of the proposed road forty acres of land, which required the investment of a large sum of money, and for that reason was interested in having the railroad built. His only hope of getting compensation for services, and of selling the land so as to avoid loss, was in the construction of the road. He had no interest in the stock, property or debts of the Evanston company prior to the making of the contract set out in the bill (Rec., 174, 256). But he had a verbal promise of all the interests of the North Chicago City Railway Company for $25,000 in cash, and for that reason undertook to find a purchaser who would build the road and furnish the funds to obtain the control of the corpora-

tion. The facts as to the corporation and its property, its rights of way and its stock, the ownership of the franchise and stock, were fully explained to Stickney, except the fact that the railway company would accept $25,000, in place of $36,847.78, was not mentioned to him. (Rec., 172.)

Under these circumstances, in February, 1880, Stickney applied to Goudy to ascertain the condition of the property. The facts were given, with a statement in writing, which was submitted to Judge Beckwith for an opinion. A contract was made, dated the 18th day of February, 1880, signed by Stickney, for himself and for Sabin and Hubbard, and by the Chicago and Evanston Railroad Company, by Goudy, its president, a copy of which is to be found on record, page 216. This contract gave the privilege to Stickney to withdraw in case he became satisfied as to a particular fact, upon giving notice in writing. Such a notice was given March 27, 1880. (Rec., 289.) In this contract, among other things, it was provided that the railroad company should proceed to obtain the right of way from the city limits on a route to be selected by it to Calvary cemetery, and perfect the right of way in the city of Chicago, and the contract then uses the following language: "*And the said Stickney and his associates shall furnish $20,000, as may be necessary and requested, to be used in procuring and perfecting such right of way.*" (Rec., 217.)

On the 13th of April, 1880, Stickney came to Chicago and called upon Goudy. He said that he had now come to talk business; that new parties were willing to go into the enterprise, but they did not care to have their names disclosed. He also said that he had not the pecuniary ability to build the road, but that the persons back of him

had the means to do so, and suggested an arrangement to satisfy Goudy of that fact. (Rec., 174, 306.) A letter was to be deposited with the cashier of the First National Bank of St. Paul, by which Stickney's associates should bind themselves to perform his contract, or that he should perform it. The letter and names were to be kept by the cashier until it became necessary for Goudy to have them. (Rec., 218, 156–158.)

The terms were discussed, not varying substantially from those contained in the contract of February 18th. April 15th Goudy wrote a letter to the cashier, a copy of which is to be found on record, page 218. An answer of April 19, 1880, was received. (Rec., 219.)

Stickney came to Chicago again on the 18th of May and remained for ten days. The contract of February 18th was taken as a basis, and memoranda and drafts of contract were made by Stickney and submitted to Goudy. These were talked over, changes made, and new drafts prepared, the business occupying about ten days. These negotiations resulted in the execution of the contracts of May 28, 1880, attached as exhibits to the bill. (Rec., 17–24.)

These contracts consisted of three parts—apparently separate agreements, but in fact, they with a fourth, constituted one agreement.

Exhibit A is an agreement between the Chicago and Evanston Railroad Company and William C. Goudy, in Which Goudy agreed:

1. To procure an adjustment of accounts between the Evanston company and the Chicago and Pacific Railroad Company, growing out of a contract of June 2, 1874, in regard to the construction of tracks on Hawthorne,

Jones and Southport avenues, and for the use of the tracks, etc.

2. Goudy was to procure the right of way from the nothern limits of the city to Calvary cemetery, and pay for the same.

3. If any suits were commenced before the tracks were relaid and put in repair on Hawthorne and Southport avenues, or within three months thereafter, involving the title to the right of way, in those streets or others where the tracks had been laid in the city, Goudy was to render his professional services.

4. The railway company was to pay Goudy $25,000 upon performance by him, by the 1st day of March, 1881.

By Exhibit B, Stickney agreed:

1. To furnish the material and construct, in the manner specified, over the right of way then acquired or to be obtained, according to a contract of even date, between Goudy and the railroad company, the road from the junction with the Chicago and Pacific to Calvary cemetery, within four months after the 1st day of March, 1881, delays caused by injunctions, etc., to be deducted, and in case of failure, $20 per day was to be paid as damages, but if the delay continued six months after the time fixed, and the road was not then completed, the railway company might end the contract, and all materials and work be kept as liquidated damages.

2. An accurate account was to be kept by Stickney & Co. of the cost and expenses, and on the completion the amount, with ten per cent. additional was to be paid by the railroad company.

The railway company agreed to pay Stickney for doing

the work the actual cost, with ten per cent., on completion of their part of the contract, and agreed not to locate the line of the road so as to use a sharper curve than an 8° curve without the consent of said Stickney, in writing.

4. Stickney & Co. might take possession at any time of the right of way, of all materials and tracks then owned by the railroad company, and all of its right on the line of the Chicago and Pacific.

5. The contract made the same day between Goudy and the railroad company was with the consent of said Stickney & Co., and was not to be changed without their consent in writing.

If the railroad company failed to perform any of its agreements provided in the contract, or if Stickney should, at any time during the progress of the work, be prevented, by the final decision of the Supreme court of the state or of the United States from laying any part of the track, then upon such failure or decision, Stickney might absolutely discontinue the performance of his agreement, unless the railway company should obtain new right to lay or use said track, or part of track, and the railroad company should pay for the materials and labor already furnished, with damages suffered by them.

These two contracts being entered into with the railway company, as a part of and a foundation for the main contract, then the agreement was entered into between Goudy and Stickney. By this agreement, Exhibit C, Goudy agreed:

1. To perform his covenants and agreements in the contract with the railroad company, a copy of which was attached, marked Exhibit A, and made a part of this contract.

2. That he would, at the execution of the contract, cause to be assigned to John DeKoven, as trustee, 875 shares of the stock of the Evanston Railway Company; also a note of even date by the Evanston company to the North Chicago City Railway Company for $36,841.78, payable in one year, with eight per cent. interest, and also an assignment of his claim for $25,000 for procuring the right of way according to the agreement marked Exhibit A, to be held in trust as thereinafter specified.

3. Goudy guarantees to keep harmless the Evanston company and Stickney from all debts of the company, except said note, and such as might be created by the agency or authority of Stickney.

Goudy further agrees to render certain professional services in suits in regard to the right of way in the city of Chicago, if any should be commenced.

In consideration of the premises Stickney agreed:

1. To pay $55,000, to wit: $20,000 on signing the contract, $15,000 within ten days after the completion of the agreement by Goudy, Exhibit A, except the fourth clause in regard to professional services, and $20,000 within sixty days after the second payment becomes due.

2. To perform the agreement relating to the construction of the road, marked Exhibit B, which was made a part of this contract.

3. To equip and operate the road from its southern end to Calvary cemetery, when it was completed, and the control of the corporation was transferred as thereinafter specified.

4. It was mutually agreed that the 875 shares of stock, the note for $36,841.78, and the assignment of the

claim for $25,000, which were to be transferred to John DeKoven, trustee, should be held by him in trust until one party or the other should be entitled to the delivery and possession of the same, *according to the terms of the agreement;* and that the deferred payments of $15,000 and $20,000 should be made by Stickney to DeKoven in trust for Goudy, or as he might direct.

If Stickney failed to make either of the payments, Goudy might declare the contract ended, and all money paid and all rights under the contract should be forfeited and kept by Goudy as liquidated damages, and DeKoven should transfer the stock to Goudy, together with all money in his hands, and all rights and interests of Stickney in the note or money to become due to Goudy for procuring right of way, or in the franchises or property of the company, should cease and be at an end.

If Stickney should make the payments and perform all of his covenants, then DeKoven should assign and transfer to him the stock, note and assignment of the $25,000 compensation, and the full control of the board of directors and officers of the company should be given to Stickney.

Until the full performance by Stickney of all of his covenants, Goudy should have the right to vote the stock held by DeKoven, as trustee, and to have five of the seven directors, while the board consisted of seven, and if composed of five, then four of the five, as if said stock had not been assigned to DeKoven. It was the intention to allow Goudy the fully possession and control of the franchises and property of the railroad company as security for the performance of the agreement by Stickney. It was understood that Goudy had the right to locate four

depots on the line, without obliging the company to erect buildings.

The agreement then contains the following, to wit:

"It is further understood and agreed, that if default be made by the party of the first part (Goudy) in the performance of any of his agreements herein contained, so that the deferred payments of fifteen thousand dollars and twenty thousand dollars shall not become due and payable under this contract, and such defaults shall continue for three months after the first day of March, 1881, then upon payment by said parties of the second part (A. B. Stickney & Co.) of the sum of twenty-five thousand dollars to said John DeKoven, trustee, for the use of said party of the first part (Goudy), in lieu of said deferred payments of fifteen thousand dollars and twenty thousand dollars, *it shall be the duty of said DeKoven* to assign said stock and deliver said promissory note and assignment of the claim of said party of the first part (Goudy) against the Chicago and Evanston Railroad Company in his hands to said party of the second part (Stickney), and said party of the second part (Stickney) shall be entitled to recover from the first party (Goudy) such damages as they may sustain by reason of such default, not exceeding thirty-five thousand dollars; but in case said second party (Stickney) shall neglect to pay said twenty-five thousand dollars within four months after the 1st day of March, 1881, *then said DeKoven shall transfer said stock and deliver said note and assignment in his hands to the first party (Goudy) or his assigns.*"

There is no provision which expressly, or by implication, relieves Stickney of covenants to construct, equip and operate the road, because of a failure by Goudy to

procure the right of way. The only provision in Stickney's contract with the company to construct the road, which justified an abandonment of the work, is that which made a failure of the company to perform its covenants, or the decision of a Supreme court against the right to use the track, or some part thereof. The only covenants of the company were to pay for the work when completed, not to change the contract with Goudy, and that Stickney might take possession of the property, etc., when he pleased. There is no pretense that the company has violated any of its covenants, or that any adverse decision of a Supreme court has been made. But this contract with the company is not the whole of Stickney's obligations. This agreement with the company only relates to the *construction* of the road. In the main agreement between Goudy and Stickney the latter expressly agrees to perform the contract with the company, which was to construct the tracks; and he further covenants with Goudy to *equip the road and operate it*. There is no provision in the main contract to relieve Stickney of these covenants.

After the mutual covenants are inserted, the contract proceeds with provisions to compel the performance of the respective parties.

First. As to Stickney, it is provided that if he fails to make either of the deferred payments of $15,000 or $20,000, Goudy might declare the contract ended, retain all money paid as liquidated damages, and all rights of Stickney in the stock, note, assignment, or in the franchises or property should cease, and DeKoven should transfer the stock, etc., to Goudy. It was further provided, for the protection of Goudy that until Stickney should perform *all of his covenants*, to wit: pay the de-

ferred installments, and construct, equip and operate the road, Goudy should have the right to vote the stock held by DeKoven, and have five of the seven directors; and it is declared to be the intention of the parties to allow Goudy to have the full possession and control of the franchises and property of the company as security for the performance of the agreement by Stickney.

Second. As to Goudy, if he makes default, so that the deferred payments should not become due until the 1st day of June, 1881, then Stickney, *in lieu* of, that is, instead of, said deferred payments of $15,000 and $20,000, might pay $25,000 to DeKoven for the use of Goudy, and it should be the duty of DeKoven to assign the stock and deliver the note and assignment to Stickney. To further protect Stickney, it was provided he might recover such damages as he might sustain by reason of such default again Goudy to the extent of $35,000.

What was to be the consequence if Goudy should fail to keep his covenants, to wit: settle with the Pacific company and pay any balance due to it—obtain the right to connect with the Pacific tracks—protect the company and Stickney from any debts—render his professional services in any suits as to rights in the city—and procure and pay for the right of way from the city to Calvary cemetery? The answer is, that he was to lose $10,000; that is, receive $25,000 instead of $35,000; and in addition thereto, Stickney could recover as damages whatever sum he might be required to pay to make good Goudy's default. The limitation to $35,000 was inserted for Goudy's protection.

The meaning and intention of the parties evidently was to compel Stickney to build, equip and operate the road, and if, because of Goudy's default, in order to do this,

Stickney had to pay for the right of way or the debts of the company, or for professional services, etc., then he was to be made good by the recovery of the sums disbursed for these purposes up to a specified amount.

There is one other feature intended to protect Stickney, and that is, that he was entitled to the possession of the stock, etc., from DeKoven, when he should pay the $25,000 in lieu of the $35,000, while otherwise the stock, etc., was to remain with DeKoven until Stickney performed *all of his covenants.* With these exceptions the obligations of Stickney remained the same.

There is one remaining provision, inserted for the benefit of Goudy, which is that if he made default so that Stickney might make the alternative payment of $25,000 that the right to make such payment was to continue for one month, and if not paid by Stickney on or before the first day of July, 1881, then DeKoven should transfer said stock and deliver said note or assignment to Goudy or his assigns. *The result of that was to close out all of Stickney's rights and end the contract.* This is the reading and the meaning of the paper.

Goudy did not fully perform by placing in DeKoven's hands the stock, note and assignment. When he failed to procure the right of way and the right to make the alternative payment thereby accrued, that was not the end of his covenants. There were still left the settlement of accounts with the Pacific and payment of any balance, the right to connect with the Pacific tracks, the rendition of professional services in suits.

Stickney could not fully perform by the payment of the deferred installments of the alternative sum. He was required to construct, equip and operate the road, and

the stock, etc., was placed in *escrow* to secure the observance of the covenants. The contracts expressly declares that DeKoven is to hold the stock, etc., *until one party or the other should be entitled to the possession of the same according to the terms of the agreement.*

Goudy did not learn who Stickney's associates were until he received a letter from Mr. Upham, who had been cashier of the First National Bank of St. Paul in 1880, which letter is dated October 9, 1883, and a copy is to be found in the record at page 291. He states that the signers of the letter are James J. Hill, of St. Paul, and R. B. Angus, of Montreal. The letter which was signed by them reads as follows: "We, the undersigned, hereby "guarantee the ability of A. B. Stickney to carry out and perform certain contracts with the Chicago and Evanston Railroad Company mentioned in the letter from W. C. Goudy, dated Washington, April 15, 1880." (Rec., 157.)

The main contract was not in fact made with the Evanston company; but was made with Goudy and was not within the strict letter of the authority. Neither James J. Hill nor R. B. Angus ever confirmed the contract; but on the contrary, Stickney said in 1882, that they had not, and that he had been unable to get them to approve of what had been done, or to say that they would build the road. Stickney never said who was back of him until June 16, 1882, when he said that Hill was the only person he knew. Neither Hill nor Angus ever authorized any extension of the contract to be made. (Rec., 175, 176.)

On the day the contracts were executed and dated, Stickney paid to Goudy $20,000 in cash. Goudy caused to be transferred and a certificate to be issued, to John

DeKoven, trustee, for 875 shares of stock, which certificate recited that no money had been paid thereon. This certificate, with the promissory note for $36,847.78, with the contract of Goudy with the Chicago and Evanston Railroad Company for $25,000, to be paid for procuring the right of way, duly assigned, were deposited with John DeKoven, together with a copy of the contract. DeKoven accepted the papers and agreed to hold them according to the terms therein stated. (Rec., 177, 307.)

Immediately thereafter, at the request of Stickney, Goudy caused two vacancies in the board of directors, there being seven places, to be filled by the election of John W. Ela and Thomas Parker, who were selected by Stickney as his representatives in the board. He settled up the account between the Chicago and Evanston company and the Chicago and Pacific Railroad Company on July 6, 1880. Goudy proceeded to examine routes, and had plats made, and carried on negotiations with various property owners to obtain the right of way. (Rec., 179.) But he did not obtain all of the right of way between the city limits and Calvary cemetery, according to the terms of the contract, before the 1st of March, 1881, nor within three months thereafter, the time of grace allowed for that purpose. A. B. Stickney & Co. did not make any other or further advances than the $20,000, paid at the time the contracts were executed. The time, July 1, 1881, fixed by the contract, by which the alternative payment of $25,000 was to be made to De Koven, expired without any payment having been made by them.

The $20,000, cash payment, was to place Goudy in funds to be paid out for the procurement of the right of way, Stickney being protected by the covenants, which

enabled him to secure the property, including such right of way, on the payment of $35,000, or $25,000, as the case might be.

This is shown by the preliminary memorandum, which expressly states: "And the said Stickney and his associates shall furnish $20,000 as may be necessary and requested, to be used in procuring and perfecting such right of way." (Rec., 216.) Goudy testifies that the expectation was to pay for the right of way from the city limits to Calvary cemetery out of the sum of $20,000 that was paid to him on the 28th of May, 1880, when the contracts were made, and that that was the object of furnishing the money. (Rec., 178.) He also testifies that when the negotiations were going on, resulting in the contract of May 28, 1880, he ascertained that Stickney did not wish to pay more than $20,000 in cash at that time, and therefore he reported such fact to Turner, and told him he could not get money enough to furnish means for getting the right of way and pay the $25,000 to be paid to the North Chicago City Railway Company, and asked that the payment to that company be deferred, to which Turner assented. (Rec., 198.)

Goudy owned a large tract of land on the lake shore, which had depreciated in value, and which he was anxious to develop and increase in price, so as to make himself whole. The main consideration to him in making the contract was to obtain the construction and operation of the railroad through his land. (Rec., 173, 194.) And this was known to Stickney. (Rec., 304.)

The certificate for stock, the franchise and all of the property of the Evanston Railroad Company belonged to the North Chicago City Railway Company. The only arrangement between that company and Goudy prior to

May 28, 1880, was a verbal one. He had an indefinite option to purchase from that company all of its interest in the Evanston company for $25,000 in cash. When he ascertained that a sale could be made to Stickney for $55,000, only $20,000 of which could be obtained in money, he made application to Mr. Turner, the president of the North Chicago City Railway Company to receive the $25,000 from the deferred payments to be made by Stickney. In order to secure that company beyond any possibility of loss, a written contract was then made between the North Chicago City Railway Company and Goudy, a copy of which is to be found in the record at page 223. This agreement shows a sale to Goudy for $25,000, one half of which was to be paid from the first installment to become due from Stickney and the other half from the second installment.

It recited the agreement with Stickney and the deposit with DeKoven, with a statement that the $25,000 was to be paid, one half from the first installment, the other half from the second installment, and in case the alternative payment of $25,000 was made by Stickney, then the whole of said $25,000 was to be paid by DeKoven to the North Chicago City Railway Company. The agreement concludes with the following language: "This agreement shall be an order to the said John DeKoven trustee, to pay the sum of $25,000 as aforesaid, to the party of the first part, and in default to assign said 875 shares of stock and said note to the party of the first part." (Rec., 224, 256, 198, 189, 211.)

No payment was ever made by Stickney to DeKoven according to the terms of the contract, and therefore no money was ever paid to the North Chicago City Railway Company. Stickney gave no notice or information to De-

Koven, and never applied to him either to make payment or for the stock, etc. Turner, the president of the North Chicago City Railway Company, having learned in the early part of June, 1882, that Goudy had made application to DeKoven for the certificate and note, caused a notice in writing to be served upon DeKoven, demanding the certificate and note in accordance with the provisions of the contract with Goudy, a copy of which was attached to the notice. On the 15th day of June, 1882, DeKoven delivered the certificate for stock and note to the president of that company. (Rec., 258, 263, 264, 188.)

On the 16th day of June, 1882, the certificate which had been issued to DeKoven was surrendered by Turner to the Evanston company, and a new certificate for the same number of shares was issued to V. C. Turner, president of the North Chicago City Railway Company. (Rec., 188, 275.)

When the certificate for stock and the note for $36,847.78 had been returned by DeKoven to the North Chicago City Railway Company and a certificate had been issued to the president of that company for the 875 shares, all interest or title held by Goudy, ceased.

In the first part of July, 1882, a new arrangement or contract was made between the North Chicago City Railway Company and Goudy. This was verbal. An option was given to Goudy, until the first day of the following October to pay $25,000 in cash for that company's interest in the stock and franchise of the Evanston company and the note for $36,847.78; but no delivery of stock, property or note was to be made to him until the money was actually paid. (Rec., 188, 258.)

On the 8th of August, 1882, while that option was

pending, Goudy made a contract with Easton and Carey, a copy of which is to be found in the record at page 403, by which he agreed to sell 889 shares of the Evanston company, to procure the resignation of the directors, and cause the vacancies to be filled by such persons as Easton and Carey might designate. In consideration thereof Easton and Carey agreed to construct and put in operation the railway to Rogers Park by March 1, 1883, and to pay $50,000.

At the request of Goudy, Mr. Turner, the president of the North Chicago city railway, placed the certificate for 875 shares, number 34, and note of $36,847.78, in an envelope, sealed it up, and made this endorsement on it: "This envelope, with its contents, is to be delivered to Edwin Walker or W. C. Goudy upon payment of $25,000 on or before September 5, 1882, and in case of failure of making such payment this envelope to be returned to me. August 19. V. C. Turner." The envelope, with the contents, was deposited by Mr. Turner in the Commercial National Bank, to be held in *escrow* until $25,000 was paid to the bank to his credit. On the 24th of August Mr. Easton, not being satisfied with the direction on the envelope, Goudy endorsed on the same the following words: "The delivery is to be made upon the payment aforesaid to Edwin Walker or J. C. Easton. August 24, 1882. W. C. Goudy." (Rec., 189, 259.)

September 5, 1882, a meeting of the directors of the Chicago and Evanston Railroad Company was held, at which a change of the directors was made. At that time Easton gave a check for $25,000 to Turner and also another check for $10,000 to Goudy. Turner procured the deposit of the certificate and note from the bank and

it was delivered by Turner to Easton on receiving the certified check for $25,000. Easton surrendered the certificate and received in place of it number 36 running to himself for the same number of shares. (Rec., 159, 275.)

William C. Goudy, Voluntine C. Turner, George Chandler, Samuel B. Chase and Ebenezer Buckingham were the directors of the Chicago and Evanston Railroad Company May 28, 1880, and during the year 1882, prior to September 5, the same persons were directors, and also John W. Ela and Thomas Parker, Jr. No one of these persons had any interest in, or connection with the contract between Goudy and Stickney, except Goudy himself. No one received any part of the $20,000, cash payment, except Goudy. DeKoven had no knowledge of the transaction, or interest in it. Being the cashier of a bank, he, at the request of the parties, took the papers to be held in escrow and did not read then until long thereafter. There is no evidence tending to show collusion, combination or fraud between these persons, as alleged in the bill.

J. C. Easton, T. W. Wadsworth, Edwin Walker, and Elijah K. Hubbard were elected directors of the Chicago and Evanston Railroad Company, September 5, 1872, and have since been re-elected at the annual meeting. S. S. Merrill was elected a director at the same time, but declined to accept. None of these persons, except Easton, held more than one share of stock. The stock was held by Easton and nine other persons.

The Chicago, Milwaukee and St. Paul Company never had and has not now, any interest whatever in the Chicago and Evanston Railroad Company, so far as this record shows.

Easton and Carey did not see the contract between

Goudy and Stickney, and were not informed of its contents. They knew that there had been some arrangement between them in regard to the railroad, but were informed that such arrangement had been ended. They had no information whatever showing or tending to show that the time in the written contract had been extended.

The facts hereinbefore stated are not denied and there is no controversy about them.

By the express terms of the contract it was provided for the protection of Stickney & Co., that in case of default on the part of Goudy, they might pay $25,000 to DeKoven, for him or his assigns (and his assignee was the South Chicago City Railway Company), and it was to be the duty of DeKoven "to assign said stock and deliver said promissory note and the assignment of the claim of said party of the first part against the Chicago and Evanston Railroad Company in his hands to the party of the second part," * * * "but in case said second party shall neglect to pay said twenty-five thousand dollars within four months after the first day of March, 1881, then said DeKoven shall transfer said stock and deliver said note and assignment in his hands to the first party or his assigns." (Rec., 293.)

When it is considered that the $25,000 when paid to DeKoven, was to be by him paid to the North Chicago City Railway Company, and that Goudy had no right to the stock and note until the $25,000 was paid to the railway company, and that he by an agreement made on the same day as the others, which was a part of the contract, had directed this amount of money to be paid to that company, all of which was known to Stickney, it is clear that the failure by him to make such payment within the

time limited, ended all right of Stickney & Co. to claim the stock.

It is clear that the parties intended to make time the essence of the contract, even if that principle was not applicable to such a transaction.

The appellant, however, claims that the time was extended by mutual agreement between Stickney and Goudy, and that the latter in making such an agreement for extension represented the railway company and DeKoven.

It is, therefore, necessary to consider that question. Mr. Goudy was not authorized to represent either of these parties, and they knew nothing of the alleged extension until after the bill was filed. There was no such argreement of which they could be advised.

Controversy as to Facts.

The bill avers that after the contract of May 28, 1880, was executed, Goudy from time to time applied to Stickney & Co. with the knowledge and consent of the Chicago and Evanston Railroad Company, the North Chicago City Railway Company and DeKoven, for further time in which to obtain the right of way, and represented that no interest would suffer by delaying the obtaining of such right of way until the spring of 1882.

The bill also alleges that Stickney & Co. assured Goudy, that unless the right of way could be obtained within the time contemplated by the contract, they would be unable to construct the road before the spring of 1882. Whereupon it was agreed and understood by them, that Goudy might have more time, and that Stickney & Co.

should proceed in the spring of 1882 to construct the road as soon as the right of way should be secured. The bill also alleges, that the time for performance was by mutual agreement waived and extended from time to time with the consent of DeKoven, Turner and the directors of the Evanston company. (Rec., 11.)

Goudy, in his answer, denies that he ever applied for further time in which to perform his agreement for obtaining the right of way. He denies that he ever represented, that no interest would suffer by delaying the obtaining of said right of way until the spring 1882. He denies that it was ever agreed or understood, he might have more time than that mentioned in the contract, and that Stickney should proceed in the spring of 1882 to construct the road. He denies that the time for performance of the covenants, was by mutual agreement waived and extended from time to time. He denies that he represented, in any way whatever, DeKoven or the North Chicago City Railway Company, or any of the other defendants, in regard to the contract of May 28, 1880, or any extension thereof, or that he was authorized to represent or represented the Chicago and Evanston company, in reference to said contract, or any extension thereof. (Rec., 89.)

Similar denials are made in the answers of other defendants.

There is, therefore, an issue of fact, as to whether or not there was a mutual agreement to extend the time for procuring the right of way and for constructing the road.

There was no personal interview between Stickney and Goudy, after the contract was made May 28, 1880, until

the middle of February, 1881. All of the correspondence between the parties during that time is in the record. This consists of some telegrams in July, 1880, (Rec., 331, 220); a letter from Stickney to Goudy, dated December 26, 1880; and a second letter dated January 3, 1881; and the answer of Goudy to the same, dated January 5, 1881. (Rec., 220, 221.)

There is nothing in these telegrams or letters on the subject of extension. (Rec., 180, 181.)

The first time that Stickney and Goudy met was about February 14, 1881, when Stickney was *en route* to New York and called at the office of Goudy in Chicago. The next interview was February 22, 1881, when Stickney called there again on his return from New York. (Rec., 181.)

The next time Stickney was in Chicago was April 13, 1881, on which day Goudy was in Haverhill, Massachusetts. (Rec., 277, 182.) Stickney had a conversation with Chandler at that time. (Rec., 277.)

The next personal interview between Stickney and Goudy was on September 27, 1881. (Rec., 182.) The next was on December 19, 1881. (Rec., 184.) The next was on June 16, 1882. (Rec., 184.) The last and final personal interview was about the middle of August, 1882, and occurred at St. Paul. (Rec., 192.)

The foregoing dates are given by Goudy and Chandler. Stickney does not contradict them as to any of these dates. With two exceptions, he is unable to give any date or to fix any time, when any interview occured, and states that he is unable to remember any other particular times. The two exceptions are February 22 and April 13, 1881, which with the aid of a diary, after being repeatedly

pressed to give specific dates, he was able to fix. (Rec., 322.)

It may, therefore, be safely assumed that the only interview between Stickney and Goudy, at which there could have been any extension of time agreed to, was February 22, 1881; that being the only time between the making of the contract and the expiration of the time for the payment of the $25,000 by Stickney when the parties met. It may also be assumed that the only personal interviews between them *after the time had expired* were September 27th, or within two or three days thereafter, and December 19, 1881, and June 16 and August 15, 1882. All of the correspondence between the parties is in evidence. This consists of a letter from Goudy to Stickney, dated May 2, 1881 (Rec., 332); an answer thereto, dated May 14, 1881 (Rec., 221); a telegram from Stickney to Goudy and an answer thereto, both dated August 27, 1881 (Rec., 332, 333); a telegram from Stickney to Goudy dated August 29, 1881 (Rec., 333); a letter from Goudy to Stickney, dated September 1, 1881, and another dated September 14, 1881 (Rec., 333, 334); a telegram from Lowry to Stickney, dated May 4, 1881 (2?) (Rec., 335); a letter from Stickney to Goudy, dated May 29, 1882, and an answer thereto, dated June 5, 1882. (Rec., 222.)

If there was any extension of time asked by Goudy, or granted by Stickney, the evidence is to be found in the testimony as to these conversations, and by an inspection of the contents of the telegrams and letters. These are to be taken in connection with the admitted facts and circumstances surrounding the parties.

The complainant introduced Stickney as a witness, and relied upon his testimony to prove the allegation of the bill

as to the extention of time. His testimony is vague, uncertain and unsatisfactory. He admits his memory is bad; and it is apparent from a reading of his deposition, that he had no distinct recollection in regard to any of the conversations about which he testifies.

Stickney first says that he had several interviews with Mr. Goudy, and asked him how he was getting along about the right of way. He undertakes to state, in a very general way, some conversation in which Goudy claimed that he was having unexpected trouble in procuring the right of way, and that it would cost more than he had anticipated. Then he says, that the last time he saw Mr. Goudy before he repudiated his contract, he particularly requested him to give him more time to get the right of way. He also says that this conversation was about the time that the time was expiring, and that he told him that if more time was given they should want him to waive the condition of forfeiture in the contract on their part. He also says that he asked Goudy to write a letter to him to that effect, but that he excused himself, and promised to write such a letter and forward it to St. Paul, but that he never did so. (Rec., 308 and 309.) This must have been the interview in December, 1881.

It is evident that Stickney is mistaken as to the time of the conversation which he undertakes to give. The only time that he had an opportunity to have such a conversation was February 22, 1881, which was near March 1st, the time fixed for completing the right of way. The time when he claims, Goudy repudiated the contract was when Lowry called, May 4, 1882 (Rec., 312), and the last time before that when he met Goudy was December 19, 1881, and that was the time, according to the testimony of both Goudy and Chandler, in which there was a request

to write a letter. He probably intended to state a conversation, according to his recollection, which took place February 22, 1881. In this he was mistaken.

The next conversation which Stickney undertakes to state was the latter part of September, 1881. He says that the terms on which the Milwaukee and St. Paul company should be allowed to occupy the right of way, were talked over. That he authorized Mr. Goudy to make an arrangement with that company to occupy 1,500 feet jointly by paying $40,000 for the privilege. (Rec., 311.)

He says the next conversation was probably in December of 1881, or might have been in January, 1882. He says this was a repetition almost of the former conferences; that Goudy claimed the right of way was a great deal more difficult to get than he expected; that it was costing him more money than he expected; that he thought he would have it ready to commence work on in the spring; and that they had already consented to his taking more time, by telegraph. (Rec., 311.)

Goudy makes a clear and connected statement of each of the interviews that he had with Stickney. The first, after the making of the contract, was on February 14, 1881. The second was February 22, 1881. The subject-matter of these two conversations was mainly in regard to procuring a suitable man to relay the tracks on Southport avenue, Stickney anticipating a disturbance from a mob when the work should be done. At his request, a man by the name of Stewart was found, between the two visits, and the fact reported to him. Goudy admits that he stated to Stickney at that time, that he had great difficulty in getting the right of way—more than he had expected—and that it had cost more money than

he had any idea it would; and that he also stated that he expected to complete the work and get the right of way within a few weeks from that time; but he says that he then knew from a recent examination of papers, that he had until the first of June in which to complete the right of way, and was confident that he could accomplish it before that date. (Rec., 181, 197.) He is corroborated by Chandler as to this conversation, at which he was present. Chandler says, that he did not hear any application by Goudy to Stickney for an extension of time to get the right of way, or any talk as to an extension or as to ability to get the right of way within the time required by the contract. (Rec., 276, 277.)

There was no conversation between Stickney and Goudy April 13, 1881 (Rec., 182, 197), but there was a conversation between Stickney and Chandler on that day. Chandler says that Stickney asked how the right of way was getting along, and had some talk about when he could commence work. He remembered Stickney's saying something to the effect that two or three weeks, one way or the other, did not make any particular difference with him. He had no authority to make any arrrangement with Stickney, and Goudy did not confirm anything that had been said. (Rec., 277.)

The next conversation was the last of September, 1881. Stickney came to the office of Goudy September 27th and remained in Chicago, so that his last call was on the 30th of that month. The subject-matter of the conversation was suggested in the letters of September 1st and 14th and related to giving permission to the St. Paul company to have the joint use of about 1,500 feet of track. (Rec., 182.) Chandler heard the conversations at that time, and says that he did not hear any talk of an extension of

time having been made before or any to be made thereafter. (Rec., 276.)

The next conversation was December 19, 1881. Goudy says that he then told Stickney that he was unwilling to go on under the contract. That the difficulty had been such and the price had been so large, that it required a great deal more money than the amount provided in the contract, and if anything further was done, there must be a new arrangement by which a larger sum of money could be paid for a right of way. Stickney, at that time, stated substantially this: "I got those contracts the other day and read them over, and I saw the darned thing had run out," and stated that he would like Goudy to write a letter that he could show to his people up at St. Paul and give them a chance to go on with it. Goudy replied, it would be impossible to do so unless some modification or increased compensation was made. That Stickney answered: "Well, there is nothing mean about me, and I am going to do what is right about this thing. Now, I resigned my position as manager of the Canadian Pacific, to take effect the first of January, and I will come down here immediately, and I will spend the most of the month of January here, and I believe there is money in this franchise, and you and I will get together and see what we can make out of it. I think we can make some money for you and make some money for me." (Rec., 184.)

Chandler corroborates this testimony, and says that Stickney then stated that he was coming here to spend a month in January and would take hold of the road and make some arrangement with the other parties by which the road could be built, and that we could get paid for our work, or something to that effect. (Rec., 278.) He says

that he heard nothing at that time by which Stickney claimed that there had been an arrangement to extend the time for getting the right of way and paying the money, and never did hear of it until after Lowry was here in May, 1882. (Rec., 280.)

This is substantially all the direct testimony on the subject of the extension of the time mentioned in the contract.

There is no pretense that the letters or telegrams before the time had actually expired, refer to the subject of extension. It is claimed, however, that the telegrams in August and letters in September, 1882, after the time had expired, contain an admission, or at least a recognition, of the fact, that there had been an extension previously agreed upon.

The first is a telegram, dated August 27, 1881, from Stickney to Goudy: "Have you got the right of way matter all settled so I can go to work on construction at once?" To this, on the same day, Goudy replied: "Some proceedings pending, to be tried within twenty days, and think no work should be commenced before that time." To this, on August 29th, Stickney replied: "No objection to your taking more time to secure the right of way; but in that case you must not expect us to commence work until next spring." (Rec., 332, 333.)

It is claimed that the telegram by Goudy to Stickney was an application for an extension of time, and that the last telegram from Stickney was a consent to an extension. It will be seen that there is no such language used, nor can any such request or permission be implied from these telegrams. The last, by stating that there was no

objection to taking more time, seems to be a cunning assumption that an extension had been requested. The statement was, that work should not be commenced for twenty days, because some proceedings were pending. There was no intimation that any long delay should occur before the work was to be commenced. Stickney eagerly seized the opportunity to claim that work should not be commenced until the next spring. The answer to this proposition is found in the letter of September 1, 1881. In this letter, Goudy says to Stickney that on receipt of the last dispatch he was about to answer that the time for completion of the road had been fixed in some of the grants of right of way, at July 1, 1882; but that the track in the city ought to be relaid during that fall, so that if there was delay by injunction the entire work would not be postponed beyond the July next. (Rec., 333.)

It seems this letter did not reach Stickney promptly, so another was written September 14, 1881, in which Goudy says to Stickney that the time fixed in the deeds for the completion of the road was July 1, 1882, and that it would be sufficient to construct the road out of the city the next spring; but that the work in the city ought to be done before winter, so as to meet any delay that might be caused by an injunction. The remainder of these two letters are in regard to a proposition of the St. Paul company to obtain the joint use of 1,500 feet of track on Hawthorne avenue, and it was suggested that they should be induced to do all the work required to be done in the city during the fall. (Rec., 334.)

It may be that these telegrams and letters produce the impression that the relation between the parties to the contract had not yet expired. The inquiry is made as to

whether the right of way has been procured so that work could be commenced. The answer is that because of some pending proceedings work ought not to be commenced for twenty days. Stickney says that there is no objection to taking more time; but in that event they should not be required to build the road until the next spring. The letters answer this telegram by the statement, that the work out of the city might be postponed until the next spring upon the condition that the road was completed in the city before the winter. But this impression is not the only construction which can be placed upon these telegrams and letter, having reference to the surrounding circumstances. But even if that is the only construction to be adopted, the condition that the work should proceed during that fall was never assented to nor performed by Stickney.

Goudy testifies, that in the interview the last of September, 1881, following these communications, he insisted that the road must be completed and put in order inside of the city limits during that fall. (Rec., 183.) He also testifies, that in the interview, December 19, 1881, Stickney then admitted expressly, that the contracts had then expired, and requested a letter giving further time, and that Goudy declined to furnish such letter and never did write it. (Rec., 184.) And that he never heard from Stickney in any way concerning the matter until the middle of the next June.

Goudy testifies as to his construction of these letters and telegrams. He says that he supposed at that time Stickney had abandoned all idea of going on with the contract, either paying money or doing the work; but that he had proceeded with procuring the right of way in order to protect himself as to the investment that he

then had in it. He says that having received the dispatch of August 27th from Stickney, he was surprised and as he had no prospect of getting any other person, at that time, to take hold of the enterprise, he was willing then, that Stickney and his associates should go on and build the road on certain conditions, and one was that they should build in the city during the fall, and complete the road in the spring before the first of July, and so telegraphed and wrote. And the other condition, which he expressed to Stickney personally, was that something should be done to meet the deficiency to pay for the right of way. Stickney went away without making any arrangement for building any of the road that fall or the next spring. When he returned in December there was a distinct understanding that the contract had expired, and that some new arrangement must be made. Stickney promised to come back and try to make some arrangement with new parties during the next month. This he failed to do and never communicated with Goudy until in June following. (Rec., 187, 278.)

It is to be remembered, that the contract was made with Stickney, relying on the financial ability of the persons who had left their names at the First National Bank of St. Paul, and that Stickney did not profess to be able to perform the contract himself. If any extension of time to Goudy was to be made, the consent of Hill and Angus, who were Stickney's associates, would be indispensable for the protection of Goudy. It is not probable, that he would have agreed to an extension upon the responsibility of Stickney alone or without using the same precautions as to his authority that he had used when the original contract was made.

It is also to be remembered, that by the contract be-

tween the North Chicago City Railway Company and Goudy, his right to the certificate for stock, and the promissory note deposited in the hands of DeKoven, expired on the first of July, 1881, with the time fixed for the alternative payment by Stickney to DeKoven of $25,000, for the use of the North Chicago City Railway Company. It is also to be remembered, that Goudy had no control of the certificate nor note, nor any power to deliver the same to Stickney, except upon the payment of the $25,000, which was to be paid by Stickney, before he was entitled to the certificate and note. It is not probable that Goudy would undertake to agree to an extension of time for the payment of the money or the delivery of the certificate and note, without the consent of the North Chicago City Railway Company; nor is it likely that Stickney would have relied upon any promise made by Goudy without an assurance from the North Chicago City Railway Company that he had authority to agree to an extension. If there had been conversations between Stickney and Goudy, as alleged in the bill, the promise for extension would have been unavailing, without the consent and confirmation of Stickney's associates and the North Chicago City Railway Company. As that company never agreed to any extension of time, and asserted its rights, under the contract, to a delivery of the certificate and note by DeKoven, and, as DeKoven, in pursuance of the terms of the writing, without any information or notice of any extension, did surrender the certificate and note to that company, whereby all right and title of Goudy to the same was ended, all claim of Stickney and his associates must necessarily have terminated at the same time.

Although the telegrams and letters in August and

September, 1881, may seem to imply that an extension of time had been previously agreed to, yet the contents of these papers are entirely consistent with the facts as stated by Goudy in his testimony, and corroborated by Chandler. Goudy denies in the most unequivocal terms, that he ever applied for an extension, or that one was ever granted, or that there was ever any talk about an extension prior to December, 1881. Chandler, with the fullest opportunities for knowledge on the subject, says, that he never heard that any extension had been asked for or allowed, unless it be the conversation between Stickney and himself, April 13, 1881, in which Goudy did not participate. Turner, the president of the North Chicago City Railway Company, who had the primary interest in the question, never heard the subject of an extension referred to at any time. DeKoven, who was required by the terms of the writings left with him, to deliver the certificate and note upon the contingency named therein, and which became fixed according to the terms of these writings on July 1, 1881, was never informed that any extension had been made. Stickney knew that his right under the contract would end July 1, 1881, unless he paid the money mentioned to DeKoven. On December 19, 1881, his attention had been called to the fact that the time had expired, and he then requested a letter enlarging the time or renewing the contract. He was then told by Goudy that some new arrangement would have to be made. Stickney did not pretend, in that conversation, that his associates desired to execute the contract, but he did say that some new arrangements could be made with other parties by which some money could be made out of it for him, as well as for Goudy, and that he would come to Chicago and spend the month of

January endeavoring to make such new arrangement, which he failed to do. Stickney knew, May 4, 1882, by telegram from Lowry, that Goudy then asserted that all rights under the contract had ceased. May 29, 1882, Stickney wrote to Goudy that he was in receipt of letters and telegrams from Lowry saying that he claimed all rights had been forfeited. Stickney says in the letter, he was very much surprised at the information, as the delay had been entirely at Goudy's request, both verbal and written, stating that he had the letters and telegrams showing an extension. All of the letters and telegrams, which Stickney had, have been produced, and no one of them contains a request for delay, unless it be the telegram of August 27, 1882, after the time limited in the contract had expired, in which it is simply said that the work ought not to be commenced for twenty days. There is no hint of a request for extension or delay, or of consent to it, in any letter or telegram before July 1, 1881. Goudy answered the letter of May 29, 1882, June 5, in which he expressly declared, that he had learned that Stickney and his associates had abandoned all idea of proceeding with the execution of the contract, and that such contract by its terms had expired, and that his failure to give further attention to the matter confirmed the idea that the contract was abandoned. June 16, 1882, Stickney was in Chicago and had an interview with Goudy, in which the subject of the forfeiture of the contract was discussed. Goudy then asserted that he was under no legal liability to pay any money, but offered, as a compromise, to pay $7,500. He then stated to Stickney that he had no further control, because the certificate of stock and the note which had been left with DeKoven had been surrendered to the North Chicago City Railway Company, and, therefore, it

was impossible for him to make any arrangement about it, even if he was disposed to. Stickney said that he did not think Hill, who was then mentioned for the first time, would be willing to pay any more money, and would insist that the contract was in force. This proposition Goudy denied, and stated that, even if it was correct, he had lost all power to deliver the stock or to cause it to be delivered, and that the only question open was whether he was liable for the $20,000, or any part of it. Stickney said that he could not decide upon the proposition, but that he would submit it to Hill and send an answer, which he never did. (Rec., 185, 186, 235.)

Notwithstanding Stickney's knowledge of the terms of the contract, his failure to comply with the conditions mentioned by Goudy in September, 1881, as to building that fall and furnishing more money to pay for right of way; his knowledge, admitted in December, 1881, that the contract had ended; his notice from Lowry in May, 1882, of the claim by Goudy, that the contract had been ended; the notice in writing, by the letter of Goudy of June 5, 1882, that the contract had expired and all his interest had terminated; yet not a dollar was paid under the contract, nor was an offer made to pay a dollar, prior to the filing of the bill in the present case, November 17, 1882. If Stickney had been entitled to notice, under the contract, and by express stipulation, to make the alternative payment, he had such notice, according to his own admission eleven months before the bill was filed, and yet showed no disposition to avail himself of it or to part with any more money. The only matter left open and which was pending, was a proposition made by Goudy to pay $7,500, *as a compromise of claims*, which he disputed at the time of making the proposition.

As there is some conflict between the testimony of Stickney and Goudy, it may be necessary to determine the credit to be given to the statements of each. Attention is called to the fact that Stickney admits a *defective memory* and *inability to specify time*, or to state much that had occurred, and shows that he has forgotten entirely the important interview which occurred in Chicago, June 16, 1882, while Goudy is exact in giving the date of every conversation and the substance of all that occurred, showing a clear memory on his part.

Stickney is contradicted as to very many of his statements. He says that Mr. Turner came into Goudy's rooms, and all the negotiations were gone over and certain representations were made by Turner. (Rec., 304.) But later in his testimony he says that he never saw Turner but once, and then not for more than *two minutes*, when he was introduced to Mr. Turner, nothing else taking place. (Rec., 316.) Turner, Chandler and Goudy each state that Stickney had no conversation with Turner whatever in regard to this business; that the only time he saw him was for one or two minutes when an introduction occurred, and the subject of the railroad was not mentioned. Stickney says that the North Chicago City Railway Company had no interest in the stock, but merely had a lien for a debt due to it. The testimony shows *beyond dispute*, that the franchise and property of the Chicago and Evanston Railroad Company was owned by the North Chicago City Railway Company; that Goudy became a purchaser under a written contract, made on the same day of the contract with Stickney, but did not secure the possession or control of the stock or property—that being left with DeKoven, waiting the payment of the purchase money under the contract. Stickney said that

the stock consisted of 1,200 shares, and that Goudy owned or controlled about 1,000 shares. The evidence shows that the whole number of shares was 1,000, and that the number subject to be transferred to him was 875. Stickney says he and Goudy went to the bank and read the contract over to DeKoven and explained it to him, and that the contracts were exhibited to him; while it appears from the testimony that the contracts were not read to DeKoven, that he declined to sign any paper, but received them without knowing the contents. Stickney says that he saw Goudy in Chicago April 13, 1881, while it conclusively appears that on that day Goudy was in Haverhill, Massachusetts.

The burden of proof as to verbal extension, rests upon the complainant and, unless it is clearly established by the proof, the court must find against the complainant. The bill alleges, that Goudy represented the North Chicago City Railway Company and DeKoven, in agreeing to an extension. This allegation is made apparently because of the *necessity of bringing them into* the alleged arrangement. There is not the slighest proof to sustain this averment; but, on the contrary, the evidence shows, without contradiction, that Goudy did not represent any one but himself; that he had no authority from DeKoven or the North Chicago City Railway Company, or the Chicago and Evanston Railroad Company, to act for them, or either of them, with reference to said matters, or to disturb or modify any of the contract which had been made.

Relief Prayed.

The bill prays:

1. That the pretended transfer of the 875 shares of stock, the note and claim to Turner, and to Easton, Wadsworth, Walker, Hubbard, Merrill and Johnson, and said pretended elections of said Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill, as directors, and said Easton as president, and Wadsworth as secretary and treasurer of the Chicago and Evanston Railroad Company, be set aside and declared null and void.

2. That all proceedings for forfeiture of said 875 shares, or 110⅔ shares of stock, be set aside and declared null and void.

3. That Turner, Wadsworth, Easton, Walker, Hubbard, Merrill and Johnson be decreed to deliver, transfer and assign the 875 shares of stock and said note and claim, and the control of said Chicago and Evanston Railroad Company to Hill, and that the other defendants cause the same to be done, so far as they have the control thereof.

4. That the Chicago and Evanston Railroad Company register and cause to be transferred said stock on the books of the company to Hill in accordance with the charter and by-laws of the company.

5. That the title of Hill in and to the property be quieted.

6. That the defendants be perpetually enjoined from transferring, assigning or disposing of the stock, note or claim, and from voting on or otherwise using said stock, and that the Chicago and Evanston Railroad Company

be enjoined from permitting said Turner, Easton, Wadsworth, Walker, Hubbard, Johnson, Merrill, or any other person than Hill, to vote said stock and from recognizing Turner, Wadsworth, Walker, Hubbard, Johnson, Merrill, or any other person than Hill, as the rightful owner thereof, and that said last named defendants be enjoined from taking any possession, control or management of, or in any manner intermeddling or interfering with said Chicago and Evanston Railroad Company, its railroad or franchises, or any of its property, rights, interests or privileges; and that, in the meantime, a temporary injunction issue, during the pendency of the suit, so restraining and enjoining the defendants.

The original bill has been amended by making Julius Wadsworth and others co-defendants, as associates of Easton, and the same relief is prayed against them as against Easton.

It will be observed that no relief is asked against several of the defendants, viz: the North Chicago City Railway Company, John DeKoven, Ebenezer Buckingham, Samuel B. Chase, George Chandler and William C. Goudy, and no relief is asked for or is possible against Turner, except the naked injunction.

The evidence discloses that A. B. Stickney and R. B. Angus were interested in the contract sought to be enforced, but they are not made parties.

PART III.

QUESTIONS OF LAW.

A demurrer was filed to the bill and overruled by the court. In announcing the decision, the court said, that the demurrer was overruled because of the averment, that the defendants, Goudy, Turner, Chandler, Chase, Buckingham and DeKoven were charged with being conspirators and confederates together, to defraud the said Stickney and Company and Hill, and in that relation to each other, induced said Stickney and Company to enter into the contract "Exhibit C" and to pay the sum of $20,000 to the defendant Goudy, and that *all* of the defendants, knowing of said fraudulent conspiracy, had caused the stock and note, together with the contract of the railroad company, to be transferred by DeKoven, in violation of the trust and in fraud of the rights of Stickney and Company, to the defendant Turner, and by Turner to Easton and others without any consideration paid by Turner for the same. In other words, the court held that because of such allegation of fraud and collusion on the part of the defendants as against the complainant and Stickney and Company, the bill was sufficient upon its face to call for an answer.

There is no evidence tending to prove this averment of the bill, or to establish any combination or fraud or collusion against Stickney & Co. The proof shows, that no one of the defendants was connected with the making of the contract or the receipt of the $20,000, except Goudy. The North Chicago City Railway Company merely provided, by proper means, for securing the pay-

ment of $25,000 to itself, before parting with the control of its property. DeKoven was not a party to any of the transactions further than that he consented to hold the certificate, note and assignment of claim, merely as a depository and in *escrow*, to be delivered to one party or the other when the contingency, provided for in the contract, occurred.

Buckingham, Chase and Chandler held one share each of the Evanston Railroad Company, which belonged to the North Chicago City Railway Company, and were directors of the company. They never had any interest in the matters now in controversy. Although it is alleged that Turner was in some way connected with Easton, and he is included in the prayer for relief, the proof shows that he had no individual interest in these matters. He was president of the North Chicago City Railway Company and was a director in the Chicago and Evanston Railroad Company, and was the holder of some of these shares for the company, of which he was president. He has never had any personal interest in the matters now in controversy.

The allegation of fraud is denied by each of the persons mentioned therein who testified in the case. (Rec., 195, 259.)

Therefore it follows, that the bill was properly dismissed as against the North Chicago City Railway Company, Buckingham, Chase, Chandler, Turner and DeKoven. There is no foundation whatever for relief as against either of them, and none asked even as against Turner, except by way of injunction, and he is shown by the evidence to have no interest in the matter either by way of liability to the complainant or otherwise.

As there has been a failure on the part of the complainant to prove the allegation of combination and fraud, because of which the demurrer was overruled, we are remitted to the questions raised on the demurrer as to the right to relief on the other allegations of the bill.

1. A court of equity will not enforce the specific performance of a contract for the sale, delivery and transfer of stock in a railroad company.

2. A court of equity will not compel the specific performance of a contract to procure the resignation of the directors of a corporation, and the election of others to fill the vacancies, or to transfer the control of a corporation.

3. A court of equity will not enforce the specific performance of a part of an entire contract, and when there is one or more of the covenants that cannot be enforced, no relief will be given.

In this instance the court would not compel Goudy to procure and pay for the right of way on an unlocated route; or to render personal or professional services; or to keep harmless the railroad company from debts; or to change the directors of the company; and therefore the court will not compel him to cause the stock, note and claim to be transferred.

4. The right to specific performance must be *mutual*. Unless each party can enforce a specific performance in case of a default, neither can.

In this instance, Goudy could not compel Stickney to construct, equip and operate the railroad or to consent to the location of depots, as provided in the contract, and therefore Stickney cannot enforce a specific performance by Goudy.

These propositions are all sustained by the authorities. If any one of them is good law the bill must be dismissed. As the cases, which will be cited relate to one or more of them, we will not attempt to argue one separately from the other, but consider them together.

An application to a court of equity to enforce the performance of a contract for the conveyance of land is *prima facie* within the jurisdiction of the court; while one to enforce a contract for the transfer of personal property is *prima facie* not within the jurisdiction.

Pomeroy on Contracts, § 11.
Parker v. *Sansom*, 61 Ill., 254.

Where the personal property is an heirloom, or is something of peculiar nature, which cannot be measured or compensated by money, performance has been enforced.

A court of equity will compel the delivery of deeds, since damages are inadequate, and legal actions for a recovery of possession are imperfect in their operation.

Brown v. *Brown*, 1 Dick., 62.
Armatage v. *Wadsworth*, 1 Mass., 192.
Reeves v. *Reeves*, 9 Mad., 128.
Jackson v. *Butler*, 2 Atk., 306.

The usual case where performance of a contract concerning chattels will be enforced is where there is some peculiar value for which damages at law would be inadequate. But even then where the parties have put a price upon the article, specific performance will be refused.

Dowling v. *Bitzerman*, 2 J. & H., 544.

So in this case, the parties fixed the price of $55,000 on the stock, note and claim, including the right of way

to be obtained and the control of the railroad company. That being the value in money as fixed by the parties, the damages which could be recovered at law would be adequate.

As the general rule is that specific performance of a contract relating to personal property will be denied, it devolves on the complainant to show the special facts, which takes him out of the general rule and brings him within an exception. It is necessary that the bill should give reasons why damages to be recovered in an action at law will be inadequate or impracticable. Unless one of these be clearly established, the bill will be dismissed for the want of equity.

Hill has not undertaken to state any such particular facts He presents the case as if the contract related to real estate. He assumes that the contract is of that nature that a court will enforce it. But there is no change of the bill relating to this contract, which could be made so as to entitle him to relief.

Hill seeks, *first*, to obtain certain shares of unpaid stock in the railroad company, and, *second*, the substitution of persons named by him as directors, which will give him the control; and this he claims by virtue of a contract embracing other stipulations and covenants on his own part which cannot be enforced.

The case of *Fallon et al.* v. *Railroad Company*, 1 Dillon, 121, is precisely in point.

Fallon, by a contract with the Missouri and Mississippi Railroad Company, agreed to furnish and lay down all the iron rails, etc., from Glasgow to Clark City, a distance of 121 miles, to fill up and surface the track, to furnish all locomotive and rolling stock, by a certain time. The

railroad company on its part agreed to obtain the right of way, to grade and construct the road bed and bridges, to furnish ties and have the road in condition, for iron by a certain time. The company was to pay a price fixed in stock and bonds as the road was completed in sections.

Fallon filed a bill and averred a failure on the part of the company to obtain the right of way, etc., that Fallon had from his own means contracted for iron, etc., enough to lay twenty-five or thirty miles and incurred liabilities to the amount of $900,000, and delivered a part of the material to the company. An offer was made to proceed, but the company adopted a resolution declaring it would not be longer bound by the contract, but would make other arrangements for the speedy completion of the road. The bill alleged that the company was endeavoring to make a new contract with other parties for ironing and equipping its road, and had determined to execute a first mortgage on the road, and to issue and dispose of its stock, and would do so unless restrained.

It is alleged that unless the plaintiff is permitted to iron and equip the road, and receive the bonds and stock, he will be without remedy, and if the company makes the mortgage to others and transfers its stock, it will be unable to respond in damages at law.

The prayer of the bill is that the railroad company be compelled specifically to perform the contract, and be enjoined from preventing the plaintiff from complying with their contract; that the company be ordered to execute and deliver to the trustee the bonds, mortgage and stock, as provided in the contract; that the company be enjoined from making any contract with others to iron and equip

the road, from transferring to others the mortgage, bonds, and stock, etc.

A demurrer was interposed to the bill and sustained, Dillon, Treat and Krekel sitting in the Circuit court. The opinion is as follows:

"DILLON, *Circuit Judge.* The main purpose of the bill is to compel the defendant specifically to execute the contract of the 13th day of August, 1869. Whether equity will decree a specific performance or leave the parties to their remedy at law, rests in the discretion of the court, to be exercised in view of the special circumstances of the particular case. And the settled rule is, that equity will leave or remit the parties to law where the remedy in the legal forum is plain, adequate and complete. But if the remedy there is doubtful or inadequate, or will not so completely effectuate justice, and specific execution be practicable, equity will entertain jurisdiction and decree it.

"Upon the case made by the present bill, the court is of opinion that it cannot decree the specific execution which the complainant seeks. Bills of the same general character with the one before us, and, in principle, not distinguishable from it, have repeatedly, and upon full consideration, been held in England not to be maintainable. *South Wales Railway Co.* v. *Wythes*, 1 Kay & Johns., 186; *Ranger* v. *The Great Western Railway Co.*, 1 English Railway cas., 1, 51; *Peto* v. *Brighton, &c., Railway Co.*, 1 Hemming & Miller Rep., 468; 1 Story Eq. (10th Ed.), 778 *a*, and note.

"The grounds upon which this doctrine rests are so fully set forth in the opinions in these cases that it is unnecessary to restate them, or enlarge upon them. No

cases in this country holding a contrary view, or denying the soundness of the English decisions have been called to our attention. The question upon authority, therefore, is decisively against the complainants.

"But if the question be not regarded as controlled by authority, the circumstances of the present case are not such, in our judgment, as to call upon the court to decree a specific execution.

"The proposed road is one of considerable length, and requiring a large sum of money to construct. A large portion of the road-bed and bridge is unfinished. For part of the distance the right of way has not yet been secured, nor the route finally located. We cannot know that the resources and credit of the company are such that it would be practicable for it to carry into execution any order we might make to comply with its part of the agreement. Comparatively but a small proportion of the contract has been actually performed by the complainants. The difficulties which the court might reasonably expect to meet in attempting to enforce from both parties a specific execution in all its parts of a work of this nature are many and great. Compensation in damages would, under these circumstances, appear to be a much more plain and practicable and just as adequate and complete a remedy as a specific execution, and less oppressive or injurious in its effect to the defendant."

After the demurrer was sustained, the question was made and argued whether the bill ought to be retained for compensation, and it was held by the same judges (Treat delivering the opinion), that it could not be, and the bill was dismissed.

The case of *Ross* v. *The Union Pacific Railway Com-*

pany, Eastern Division, 1 Woolworth, 26, is not only in point, but covers every question, and Mr. Justice Miller refused an injunction upon the ground that no relief could be granted on the bill.

The following is the opinion, so far as material to the present inquiry:

"In *Fleet* v. *Branden*, 8 Ves. Jr., 159, the chancellor refused to decree the specific performance of an agreement to level and fill up a gravel pit, on the ground that an adequate remedy for a breach of such contract could be had at law.

"Thus far it would seem that no case overrules the decision of Lord Thurlow against decreeing specific performance of building contracts. We are now, however, to examine a class of cases which are supposed to establish a contrary doctrine. Before we enter upon their consideration, let us remark certain circumstances which attend them.

"1. In each case, the building was to be done upon the land of the person who agreed to do it.

"2. The consideration for the agreement, in every instance, was the sale or conveyance of the land on which the building was to be erected, and the plaintiff had already, by such conveyance on his part, executed the contract.

"3. In all of them the building was, in some way, essential to the use, or contributory to the value, of adjoining land belonging to the plaintiff."

The court then cites and discusses several cases, and holds that the rule laid down by Lord Thurlow, in *Lucus* v. *Corneford*, 3 Brown's Ch., 166, notes, 1 Vesey, Jr., 235,

that the court will not enforce a contract to construct a building, is a true one.

The case of *The South Wales Railway Company* v. *Wythes*, 1 Kay & Johns., 186, is then cited with approval, and declared to be of the same character with the one then under consideration. In that case the company was to find land for and build stations, and the contractors were to build a double line of railway, and receive payment in new stock. A bill was filed to compel performance of the contract by the company against the contractors. A general demurrer was sustained by Vice-Chancellor Woods, and an appeal taken to the lord justice, where the judgment was affirmed, Lord Justice Knight Bruce delivering the opinion.

The Supreme court, in *Marble Company* v. *Ripley*, 10 Wall., 356, considered the question of specific performance of a contract to work a marble quarry and deliver marble therefrom. The Circuit court had entered such a decree, and the Supreme court reversed it, and, among the reasous given for the decision, the court, by Mr. Justice STRONG, said:

"Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involve skill, personal labor and cultivated judgment. It is in effect, a personal contract to deliver marble of certain kinds, and in blocks of a kind that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time

may be called upon to determine, not only whether the prescribed quantity of marble has been delivered, but whether every block was from the right place, whether it was *sound*, whether it was of *suitable size* or *shape* or *proportion*. Meanwhile the parties may be constantly changing. The marble company are liable so long as they hold the land, and Ripley's rights exist only while he holds the mill. It is manifest that the court can not superintend the execution of such a decree. It is quite impracticable. And it is certain that equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. Many of the difficulties in the way of decreeing specific performance of a contract requiring, as this does, continuous personal action, and running through an indefinite period of time, are well stated in *The Port Clinton Railroad Company* v. *The Cleveland and Toledo Railroad Company*, 13 Ohio, 544.

"Another reason why specific performance should not be decreed in this case is found in the want of mutuality. Such performance by Ripley could not be decreed or enforced at the suit of the marble company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one years notice. And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might, in itself, be free from the difficulty attending the execution in the former."

The case of *Port Clinton R. R. Co.* v. *Cleveland & Toledo R. R. Co.*, 13 Ohio State, 549, which is approved by the Supreme court in the opinion last cited, was a bill

to enforce the performance of a covenant by one railroad company to operate and manage the railroad of the other in such manner as will not forfeit or endanger the franchises and corporate rights of the plaintiff company. The relief was refused and the court discuss the question fully, citing many authorities bearing on the point. Without making extracts, reference is made to the report itself.

In *Pierce* v. *Plumb*, 74 Ill., 326, the bill alleges that complainants, being contractors for building a railroad from Pekin to Chicago, were indebted to divers persons for materials and labor, etc., and, becoming embarrassed, entered into an agreement with Plumb, whereby they turned over to him their contract with the railroad company, and all their property used in and about the construction of the road; in consideration whereof Plumb agreed to pay all of their indebtedness to their creditors as the same matured, and transfer to the complainants $15,000 of the stock of said railroad. There were certain other agreements about paying debts and indemnifying complainants against their said indebtednes and a bond given to that effect by Plumb.

Alleged that Plumb had not paid the indebtedness nor delivered the stock, and asked that a decree should be made that Plumb should pay the creditors and deliver the said stock.

Bill was demurred to. Court below sustained demurrer.

Upper court held that they had a complete remedy as to the payment of the debts by an action at law on the bond, there being in this case no surety whose rights were to be considered as in *Ramlaugh* v. *Hayes*, 1 Vernon, 189.

And then says: "With respect to the railway shares to be transferred by appellee, the question is somewhat varied. The doctrine seems well settled that a contract for the delivery of government stocks will not be specifically enforced in a court of equity, on the ground that there can be no difference between one man's stock and another's; that with the damages recoverable at law for breach of the agreement, the party may, if he please, buy the quantity of stock agreed to be transferred to him, so that damages at law, calculated on the market price of the stock, are as complete a remedy for the purchaser as the delivery of the stock contracted for.

"There is a certain class of railroad stocks which are the subject of every-day sale in the market, and their prices of sale of daily quotation in the public prints, published at the commercial centers, to which we see no reason why the same rule should not apply as to government stocks.

"This railroad stock, we presume, does not belong to that class. Still the contract is one respecting *personalty*, and the general rule is that equity will not entertain jurisdiction for a specific performance of such contracts, a compensation in damages being supposed, in such cases, to furnish an adequate remedy. There is no showing whatever of any peculiar circumstances as regard this stock; that it possesses any peculiar value; that appellant wants it *in specie*, and that they cannot otherwise be fully compensated. No ground of equitable cognizance is shown beyond the statement of the agreement to assign and transfer, and its non-fulfillment, not even an injunction being asked."

In *Foll's Appeal*, 91 Penn. St., 434 (1879), it is said:

"For reasons of public policy, equity will not decree specific performance of a contract to sell certain shares of stock of a bank *where such shares* are sought for to control the bank."

It is not necessary to state the facts. It was a clear, unambiguous contract for the transfer of fifteen shares of the bank stock of the First National Bank of North East, Pennsylvania.

The court say, page 437: "The general rule is that equity will not enforce specific execution of a contract relating to personal chattels: 3 Parsons on Contracts, 364. This is so even in England, where the equity jurisdiction is much broader than in this state.

"The reason for the rule is, that for the breach of a contract of sale of personal chattels, there is an adequate remedy at law. This is especially true of stocks and public securities which have a known market value.

"The disappointed purchaser can go into the market and purchase a corresponding number of shares of the same stock.

"To this general rule, however, there are exceptions. An article of personal property may have certain qualities not common to other articles of like description, or may have an especial value by reason of its antiquity, family association, or the like. * * * I know of no instance in this state in which a court of equity has declared specific performance of a sale of stock. *McGowin* v. *Pennington*, *supra*, which was cited on the part of the appellee, is not in point. The specific chattels in that case, whose return was sought to be enforced, consisted of a surveyor's maps, plans and papers of a like character. They manifestly came within the exception noted, and besides it was a clear case of trust. But we need not

pursue this subject further, as the case in hand turns upon a different principle.

" While the legal right of the complainant to buy up sufficient of the stock of this bank, to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A national bank is a *quasi* public institution. While it is the property of its stockholders, and its profits enure to their benefit, it was, nevertheless, intended by the law creating it that it should be for the public accommodation.

" It furnishes a place, supposed to be safe, in which the general public may deposit their moneys, and where they can obtain temporary loans upon giving the proper security. There are three classes of persons to be protected, the depositors, the noteholders and the stockholders.

" We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock as now held is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for the safe keeping of their moneys, or the business public who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it. * * *

" Were we to affirm this decree, I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock-jobbing operations. * * *

" We are of opinion that the end sought to be attained

by this bill is against public policy, and for that reason we refuse our aid."

In *Strasburg R. R. Co.* v. *Echternacht*, 21 Pa. St., 220, it is decided that:

1. A corporation cannot sustain an action against one who, before it was chartered, with others, signed a paper agreeing to take a certain quantity of its stock and afterwards refused to do so.

2. Such a paper signed by the party is not a contract. but a mere expression of the subscriber's intention.

3. Supposing it to be a contract, it is not to be enforced by a bill in equity, but at law, where the remedy would be full and complete.

In *Noyes v. Marsh*, 123 Mass, 286, it appears that:

A agreed in writing with B, that if B would buy certain shares in a corporation held by C, the company should employ him at certain yearly salary; that if the company should fail or refuse to give him employment, *A* would purchase the stock of B at a fair price, the price to be determined by arbitrators. *B* bought the stock, and then, the company failing to employ him, brought a bill to compel *A* to take the stock.

Held, that even if the agreement was not void as against public policy, a bill in equity by B against *A* for specific performance would not lie, because he had an adequate remedy at law. The stock in this case was that of a "glazed paper company."

In *Danforth* v. *Ry. Co.*, 30 N. J. Eq., 12:

Specific performance was refused of a contract to build and equip a railroad, although the contract price was to be paid in the stock and bonds of the company,

and the estimates, etc., were to be made by the company. The company declared its inability to comply with the requirements of a supplement to the act (a general law) under which it was incorporated, and the penalty for non-compliance therewith was, by the supplement, declared to be forfeiture of its charter. It therefore, and merely for that reason, declined to proceed further under the contract.

The court refused to consider the constitutionality of such supplement, so far as the defendants were concerned, and also refused to direct them to make estimates for the work already done under the contract.

The court say: "There are several considerations which forbid the granting of the relief prayed for in this suit. If this court would undertake the performance of such a contract as that stated in the bill, a contract for building and equipping a long line of railroad, building station, freight, and engine-houses, etc., etc. (and the correct and great weight of authority is decidedly against it. Story's Eq. Jur., § 726; *Ross* v. *R. R. Co.*, 1 Woolw., 26; *Fallon* v. *R. R. Co.*, 1 Dillon, 121; *South Wales Railw. Co.* v. *Wythes*, 5 DeG. & M. & G., 880), the disability of the defendants would be a sufficient reason for refusing."

In *Blanchard* v. *R. R. Co.*, 31 Mich., 43, the following clause was held incapable of enforcement: "This conveyance is made upon the express condition that said railroad company shall build, erect, and maintain a depot, or station-house, on the land herein described, suitable for the convenience of the public, and that at least one train each way shall stop at such depot or station each day when trains run on said road, and that

freight and passengers shall be regularly taken at such depot."

The opinion says: "Can the court see that in all coming time these requirements are carried out? Can it know or keep informed whether trains are running, and what accommodations are suitable to the public interest? Can it see whether the proper stoppages are made each day? Can it take notice or legitimately and truly ascertain from day to day what amounts to regularity in receipt and discharge of passengers and freight?"

In *Richmond* v. *Dubuque R. R. Co.*, 33 Iowa, 478, the principles which govern a court of equity in compelling specific performance are fully considered. The relief there sought was a decree compelling the railroad company to report the amount of grain transported, and to pay an agreed price for storage. After a general review of the authorities, it was held that there was a want of jurisdiction, because there was a remedy at law.

There is a uniformity of decisions in England and this country to the effect that a court of equity will not enforce the specific performance of a contract to construct or operate a railroad.

The S. Wales Ry. Co. v. *Wythes*, 5 DeG. M. & G., 880.
Johnson v. *Ry. Co.*, 3 DeG., M. & G., 914.
McCann v. *R. R. Co.*, 2 Tenn., Ch., 773.
Port Clinton R.R. Co. v. *Cleve. R. R. Co.*, 13 Ohio St., 544.

The other cases cited *supra*.

The same rule is applied to other works.

Fry on Spec. Perf., § 23.
Flint v. *Branton*, 8 Vesey, 159.

Booth v. *Pollard*, 4 Y. & C. Ex., 61.
Pollard v. *Clayton*, 1 Kay & Johns, 462.
Beck v. *Allison*, 56 N. Y., 366.
Mastin v. *Holley*, 61 Mo., 196.

There must be mutuality in the right to specific performance. In absence of such right in behalf of one party the remedy is denied to the other.

Pomroy on Spec. Perf., §§ 162–170.

Professor Pomroy says in section 164:

"Among the most frequent illustrations of this doctrine, a contract between an infant and an adult cannot be specifically enforced; because, as the remedy will not be decreed against the infant, it cannot be awarded in his favor. Where a vendor had, at the time of making the agreement, no estate in the land which he contracted to convey, so that a specific performance could not then be enforced against him, this want of mutuality in the remedy furnishes a sufficient defence to the purchaser against any suit which may be brought by the vendor after he has obtained the title. There is, also, a large class of contracts in which the stipulations, on the part of the plaintiff, provide for the doing of personal, confidential, or continuous acts, such as the discharge of official or quasi-official duties, the performance of fiduciary function, like those of agency, the construction, maintaining or operating of railways and other works of a similarly extensive character, all of which are in general beyond the competency of a court of equity to specifically execute by its decree, while the stipulations, on the part of defendant call for acts of a more simple, single and direct nature—perhaps, even, the mere payment of money—all of which are clearly enforcible *in specie* by the ordinary judicial

proceeding. In agreements of this kind, there is no mutuality in the right to the equitable remedy, although each party may be clearly bound by a legal obligation, and therefore, a specific performance is not granted, even against those parties whose undertakings are, in themselves, easily susceptible of enforcement by the court."

A court of equity will not compel the doing of personal acts or the rendering of professional services.

Pomroy on Spec. Perf., §§ 22, 23.
Clark v. *Price*, 2 J. Wils., 157.
Baldwin v. *Society*, 9 Sim., 393.
Booth v. *Pollard*, 4 Y. & C. Ex., 61.
Stocker v. *Brodelbank*, 3 M. & G., 250.
Clinnock v. *Sarnsbury*, 30 L. J. C., 409.
Buck v. *Smith*, 29 Mich., 166.
Roberts v. *Kelsey*, 38 Mich., 602.
Huff v. *Sheperd*, 58 Mo., 242.

A court of equity will not enforce the specific performance of an agreement by which a party stipulates with another that on payment by him of a sum of money for railroad stock, new directors to be nominated by the vendee shall be substituted in place of all the present directors except two, such agreement being an attempt to interfere improperly with the rights of others, and contrary to public policy.

Fremont v. *Stone*, 42 Barb., 169.

It only remains to apply these principles to the bill in this case.

For the purpose of convenience it may be assumed that Goudy was one party and Stickney the other, whether either of them acted for others or not.

What were the respective stipulations and covenants

in the contract, which Hill now asks shall be specifically performed?

By the contract marked Exhibit A, Goudy agreed, 1st, To procure an adjustment of the accounts between the Evanston company and the Chicago and Pacific Railroad Company, growing out of a contract of June 2, 1874; 2d, To procure and pay for the right of way from the city limits to Calvary cemetery, a distance of seven miles, and pay the damages for the same; and, 3d, To render his professional services in any suits commenced within a specified time, involving the right of way within the city limits, where the tracks had been laid.

By the contract marked Exhibit C, Goudy agreed, 1st, To perform the contract marked Exhibit A; 2d, To cause to be assigned to DeKoven, as trustee, 875 shares of the capital stock, a note of the Evanston company to the North Chicago City Railway Company for $36,841.78, and a claim of Goudy for $25,000, compensation for procuring the right of way: 3d, To keep harmless the Evanston company and Stickney from all debts of the company, except the note for $36,841.78; 4th, To give the full control of the board of directors and officers of the Evanston company to Stickney.

By the contract marked Exhibit B, Stickney agreed to furnish the materials and construct a railroad over the right of way then secured and to be obtained to Calvary cemetery, to keep an account of the cost, and for that purpose to take possession of the right of way, materials and tracks.

By the contract marked "Exhibit C," Stickney agreed, 1st, To perform the contract marked "Exhibit B"; 2d, To pay $55,000; 3d, To equip and operate the road

from its southern terminus to Calvary cemetery; 4th, In case of a default by Goudy, so that the deferred payments of $35,000 should not become due, to pay $25,000 in lieu of such payments; and, 5th, To allow Goudy to locate four depots on the line.

The contract provided that DeKoven, the trustee, was to deliver and transfer the stock, note, and claim to Stickney on payment of the money to him, according to the contract, and in case of failure to make such payment, the same were to be delivered and transferred to Goudy or his assigns.

Hill, claiming the rights of Stickney, ignores every covenant of Goudy, and every stipulation in the contract, except that which entitled him to a delivery of the stock, note, and claim.

A court of equity will not enforce the specific performance by Goudy of his covenant to procure and pay for the right of way. It appears from the contracts that the route had not been located; that had been left to the Evanston company, which was to be controlled by Goudy. A court could not determine the route, or direct Goudy to procure by purchase any particular right of way, or to condemn any property, or to pay the damages not yet ascertained. The procurement of the right of way involved personal services, the exercise of discretion, negotiations as to damages, the selection of a route, the payment of money to others, etc. These things a court would be powerless to superintend and enforce.

A court of equity cannot compel Goudy to try a lawsuit or to act as counsel.

A court of equity cannot compel Goudy to obtain the resignation of a majority of the directors and the election

of others. This would not only be an impossibility but contrary to public policy, as decided in *Fremont* v. *Stone*, 42 Barbour, 169.

As Hill asks that the stock, etc., shall be transferred *and* that the control of the board of directors be given him, and he cannot obtain one, he cannot have the other. He is entitled to full performance or to none.

A court of equity cannot compel Stickney to construct, equip and operate the railroad at the request of Goudy; it would not compel Stickney to allow Goudy to locate four depots. By the authorities cited these things are beyond the power of a court. As the right to the remedy of specific performance must be mutual, it follows that Stickney cannot obtain a decree for specific performance of the contract on his own application.

The complainant sets up a claim to 110⅔ shares of stock which he did not obtain by means of the contract. It appears that these shares were not paid, but they were a mere privilege to take that number of shares on paying up the instalments, as they might be called by the directors. When he obtained such a right does not appear. It is averred that a call was issued, that no payment was made, and a forfeiture to the company was declared. The only ground for objection to the call or forfeiture presented is that the object was to take the stock by forfeiture from Hill. But why did he not prevent it by payment, or application to prevent forfeiture. He chose to refuse payment and keep his money, as the safer course. It is immaterial whether there were debts to be paid or not. The stock was liable to call; the directors had the power to call; in case of default, there was the right to forfeit. The complainant does not deny notice. Nor does he offer now to pay.

The joining of a claim for the 110⅔ shares with that for the 875 shares, etc., under the contract is clearly multifarious, and forms a separate controversy. If forfeited to the company, it is for the company to answer for it. There is no averment that new shares instead of the forfeited have been issued.

The authorities cited to the effect that stock is not the subject of a suit in equity, apply as well to the 110⅔ shares as to the 875 shares.

If the complainant has any cause of action it is for damages in a court of law, and there is not a proper case for the decision of a court of equity. By the contract the value of the property was fixed by the parties at $55,000. It is quite evident that upon the facts stated any injury suffered can find compensation in damages. Although the stock may not be obtainable in the market, the transaction is of that kind, which shows that money compensation will afford redress. There is nothing peculiar to differentiate this from any ordinary contract for personal property. As there is an adequate remedy at law, a court of equity will not take cognizance of the case.

II.

DEFECTS OF THE BILL, WHICH MAKE IT BAD ON DEMURRER, BUT WHICH MAY BE CURED BY AMENDMENTS.

Before a complainant can obtain the specific performance of a contract he must either perform on his own part or offer to perform.

The only offer is to pay into court $25,000. But that does not come up to the measure of his obligations. Stickney agreed to pay $55,000, of which he paid $20,000,

and was to pay the balance in two instalments, when the right of way was obtained by Goudy. He was also to lay the track, purchase locomotives and cars, and to operate the road. In a certain event he was to pay $25,000 in lieu of $35,000, the deferred payments. Still he was to build, stock and operate the road, whether he paid $35,000 or $25,000. But he makes no offer in or out of the bill to perform this important part of the contract. It is evident that the construction of the road was the main consideration to Goudy. The whole money consideration was $55,000, and out of this there was a debt of $36,841.78, evidenced by the note of the Evanston company to be paid to the North Chicago City Railway Company. This left only $18,000 to be used in securing seven miles of the right of way and as compensation for the personal services according to the contract. Yet Hill now proposes to pay $25,000, take possession and control of the company, its franchises and property, and leave Goudy without a railroad.

Again it appears from the bill that the so-called stock was not paid up stock. Nothing had been paid. It was at most the right to become a stockholder on payment of one hundred cents on the dollar. It appears, from the bill, that neither Hill or Stickney responded to a call for payment, but that it has been paid by some of the defendants. The complainant makes no offer to repay the money thus paid for his use and benefit.

Still more, although Stickney agreed to build the road, and it appears that some of the defendants have proceeded to construct the road, yet the complainant makes no offer to refund the advances made for his benefit.

The bill also seeks to set aside a forfeiture of 110⅔ shares which was declared forfeited because of a failure

to pay as called by the directors, yet he makes no offer to pay up the stock or repay the money to the defendants who may have paid it.

It substantially appears from the bill, supplemental bill for injunction, and order entered that the right of way has been procured and at least seven miles of railroad has been built, and that it is being operated by some of the defendants, and yet Hill proposes to take the property in its present condition on the payment of $25,000 in addition to the $20,000 heretofore paid. He who seeks equity must do equity.

J. N. JEWETT,

For Appellees dismissed by decree of June 8, 1885.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

JAMES J. HILL,

vs.

CHICAGO & EVANSTON RAILROAD COMPANY ET AL.

Appeal from the Northern District of Illinois.

MOTIONS TO DISMISS APPEALS.

E. WALKER,
W. C. GOUDY,
FOR APPELLEES.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

JAMES J. HILL

vs.

CHICAGO & EVANSTON RAILROAD COMPANY ET AL.

Appeal from the Northern District of Illinois.

STATEMENT.

On the 17th day of November, 1882, James J. Hill filed a bill in equity in the Circuit court of Cook county against the Chicago and Evanston Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, Samuel B. Chase, Ebenezer Buckingham and John J. Johnson, J. C. Easton and S. S. Merrill.

The bill set forth a certain contract made on the 28th day of May, 1880, which consisted of three parts, and all constituting the same transaction. A. B. Stickney & Co., composed of A. B. Stickney and James J. Hill, mad

an agreement with the Chicago and Evanston Railroad Company, agreeing to construct a railroad track from the city of Chicago to the south end of Calvary cemetery, a distance of about seven miles. Another agreement was made between Wm. C. Goudy and the Chicago and Evanston Railroad Company, by which he agreed to procure certain right of way over which the railroad track was to be constructed. Still another agreement, in writing, was made between A. B. Stickney & Co. with William C. Goudy, in which the latter agreed that he would perform the contract with the Chicago and Evanston Railroad Company; that he would cause to be assigned to John DeKoven, as trustee, eight hundred and seventy-five shares of the captital stock of said railroad company, and also a certain note for $36,847.48 given by said railroad company to the North Chicago City Railroad Company, and, also, all his rights to compensation for procuring the right of way, to be held in trust, for the purpose of delivering the same to said A. B. Stickney & Co. on the performance by them of their part of the contract, but in case of failure, to deliver the same to the said Goudy or his assigns. The contract provided for the payment by Stickney & Co. to Goudy of $20,000 in cash, and $35,000 in two installments, to be paid when the right of way should be procured. The contract further provided that if Stickney & Co. neglected to make either of the payments the contract might be declared ended, and all money paid, and rights under the contract, forfeited, and, if default should be made by the said Goudy so that the deferred payments should not become due and such default continue for three months after March 1, 1881, then upon payment by Stickney & Co. of $25,000 to DeKoven, the trustee, in lieu of said deferred

payments, it should be the duty of DeKoven to assign the stock, note and claim to Stickney & Co., and that he also be entitled to recover from said Goudy such damages as they might sustain by reason of the default, not exceeding $35,000; but in case Stickney & Co. should neglect to pay $25,000 within four months after March 1, 1881, then DeKoven should transfer the stock, note and assignment to the said Goudy or his assigns.

These three separate agreements constituted one contract, and are attached to the bill, marked "A," "B" and "C."

The bill further alleges that DeKoven accepted the trust, that Goudy placed in his hands the certificate for the shares of stock, the promissory note and the assignment of the claim; that the cash payment of $20,000 was made, but that Goudy did not perform his part of the contract in procuring the right of way, and for this reason the deferred payments did not become due.

The bill further averred that on the application of Goudy the time for his performance was extended by agreement until the spring of 1882, and in making such agreement he represented all the parties interested in the transaction and that thereby the time for making the alternative payment of $25,000 by Stickney & Co. was also extended, and that the said Stickney & Co. were not in default upon their part.

The bill further alleges that, notwithstanding these facts, the shares of stock were transferred to Easton and other of the defendants representing the Chicago, Milwaukee and St. Paul Railway Company, who took the same with notice of the rights of the complainant, and that the directors of the Chicago and Evanston Railroad Company

had been changed so as to place it in the control of the purchasers of the stock.

The bill also claimed that another block of stock of one hundred and ten shares, belonging to A. B. Stickney & Co. had been forfeited illegally by the company.

The bill also averred that the defendants, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, and John DeKoven, conspired together to defraud Stickney & Co. and the complainant, and induce them to enter into the contract and pay the said sum of $20,000.

The bill also averred that Stickney had assigned his interest in the contract and matters in controversy to the complainant, Hill, and he offered to pay into court $25,000, to be paid to such defendant as might be entitled thereto.

The bill waives an answer under oath, and prayed that the transfer of the stock and note, and all forfeitures of the eight hundred and seventy-five shares, or one hundred and ten shares, be set aside, and that the same be transferred to the complainant, and the control of the railroad company given to him; that the railroad company be required to register the transfer of stock on the books, and that the title of the complainant in the property be quieted, and for general relief. (Rec., 4–26.) Answers were filed by the North Chicago City Railway Company (Rec., 84), the Chicago and Evanston Railroad Company (Rec., 124), and by William C. Goudy (Rec., 162).

Answers were also filed by the other defendants. It is sufficient to say that while the execution of a contract was admitted, it was not the one alleged in the bill, issues of fact were made as to the material statements of the bill.

An amended bill was filed (Rec., 192), making some additional defendants, who filed answers (Rec., 205).

Replications were filed, and evidence taken, by all the parties, and final hearing was had before Mr. Justice Harlan upon the pleadings and evidence, who delivered the opinion in writing, which is to be found in the record at page 243, and is as follows:

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

James J. Hill
vs.
The Chicago & Evanston Railway Co. *et al.*

MONDAY, June 8, 1885.

DECISION.

HARLAN, J.: It is hardly necessary in this case, I suppose, to make any very full statement of the facts, for they are of course in the mind of counsel, the case was so recently argued.

Briefly stated, the main object of this suit is to obtain a decree compelling the transfer and assignment to James J. Hill of certain shares of stock in the Chicago and Evanston Railroad Company. To that suit are various defendants, William C. Goudy, Volney C. Turner, John DeKoven, George Chandler, T. W. Wadsworth, Edwin Walker, D. K. Hibbard, Samuel B. Chase, Ebenezer Buckingham and John R. J. Johnston, of this state, J. C. Easton, the Chicago, Milwaukee and St. Paul Railroad Company, the North Chicago Railway Company, the Chicago and Evanston Railway Company.

I am of the opinion that this suit must be dismissed as

to the defendants, DeKoven, Turner, Chandler, Goudy, North Chicago City Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, for want of equity, with costs to each of those defendants. The grounds upon which that conclusion rests are these:

Mr. Goudy obtained a contract with the Chicago and Evanston Railway Company, under which it became his duty to secure certain rights of way to the end that this railroad might be completed from a certain point in this city to Calvary Cemetery, beyond the limits of the city, in the town of Evanston. He was to receive $25,000 when he performed his part of that contract. On the same day a contract was entered into between A. B. Stickney & Co. and the Chicago and Evanston Railway Company, by which Stickney & Co. undertook the construction of that railway, and were to receive certain compensation from the company. On the same day Mr. Goudy made a contract with Stickney & Co., which contract is the one principally involved in this litigation, and by which the rights of the parties are to be determined By that contract Goudy undertook that he would perform all the covenants and agreements contained in his contract with the ~~covenants and agreements contained in his contract with the~~ Chicago and Evanston Railroad Company. He also agreed that he would cause to be properly assigned to DeKoven, as trustee, 875 shares of the capital stock of the Chicago and Evanston Railway Company, to be held by DeKoven in trust for purposes not necessary at present to be stated; and also cause to be properly assigned to DeKoven, as trustee, a certain note made by the Chicago and Evanston to the North Chicago City Railway Company. Observe, his agreement is to *cause* these assignments to be made. That

arose from the fact alleged in the bill and abundantly shown by the testimony that those certificates of stock, and that that note *were, at the time of the agreement, the property of the North Chicago City Railway Company.*

Mr. Goudy undertook by that agreement to render certain professional services, which, as appears from the face of the contract, were to be directed to the end of securing the right of way for the construction of this road. Mr. Goudy had become and had been for some while the owner of certain unimproved real estate in the neighborhood of Evanston and was concerned in these contracts with the road from the desire to have this road constructed so as to benefit his property.

In consideration of the premises, Stickney & Co. agreed as follows: That they would pay the sum of $55,000 in installments, $20,000 on the signing of this agreement to be paid to Mr. Goudy; in ten days after Mr. Goudy shall have performed and completed all of his agreements with the railroad company they were to pay $15,000 more; and sixty days after that payment the final payment of $20,000 was to be made. So that the first, the installment of $15,000, did not become due and payable until Goudy had performed his contract with the railway company by securing these rights of way so the road could be constructed.

Now, it is provided in the contract that DeKoven should hold these shares of stock and this note in trust until either the party of the first part, which is Goudy, or the second part, Stickney & Co., shall be entitled to the delivery and possession of the same according to the terms of this contract. The $15,000 and the $20,000 were to be paid to De Koven in trust for Goudy.

Now, if Stickney & Co. failed or neglected to make the payment of these two installments as prescribed in the contract, then the contract was ended, if Goudy so elected, and all the money and all rights were to be forfeited and might be kept by Goudy as liquidated damages, and DeKoven was to assign and transfer the shares of stock held by him to Goudy together with any money in his hands, including Goudy's claim for compensation under his contract with the railway company.

It was further agreed that if Goudy made default in the performance of his agreement, so that Stickney & Co. were not required to make the payments of $15,000 and $20,000, and such default shall continue for three months after the first of March, 1881, then Stickney & Co. were at liberty under the contract to pay $25,000 over to DeKoven as trustee, in lieu of the $15,000 and $20,000 payments; and thereupon it became the duty of DeKoven to assignto them the stock and the note, and they were entitled in that contingency to recover from Goudy such damages as they sustained by reason of such default not exceeding $35,000; but in case—and this is a material part of this case—" but in case said second party shall neglect to pay said $25,000 within four months after the 1st day of March, 1881, then DeKoven shall transfer said stock and deliver said note and assignment in his hand to the first party or his assigns." The materiality of the language is strengthened by a reference to the contract made the same day between Goudy and the North Chicago City Railway Company, by which the stock was placed in the hands—*only placed in the hands of Goudy*—and he was authorized to deposit it with DeKoven in accordance with his contract with Stickney & Co., *but under the distinct agreement that if that $25,000 was not paid to the hands*

of DeKoven for the North Chicago City Railway Company, on or before the first day of July, 1881, then DeKoven, upon the production of the contract between Goudy and the North Chicago City Railway Company, should hand that stock and note back to the North Chicago Railway Company.

So, the case in brief then is this: Goudy undertook to so secure the right of way, and he had until a certain period in 1881 to do it. If he did not procure that right of way by the first day of June, 1881, then Stickney & Co. could step forward and pay $25,000 and obtain the stock and note; but if they did not pay $25,000 by the first day of July, 1881, then the stock and note were to be handed to Goudy or his assigns, and in this case his assigns would be the North Chicago Railway Company, because by his contract with that company the production of that contract was the order to deliver the stock back to them.

So Goudy failed to perform his contract by the time allotted. Therefore, the payment of $15,000 and $20,000 from Stickney & Co. did not become due and payable, and Stickney & Co. failed to perform that act which by the terms of the contract was essential to entitle them to this stock and this note. It is alleged in the bill, and itis undoubtedly true from all the proofs, that these four contracts were executed on the same day, and as to three of them, reference being made in each to all the balance, was one transaction, and that each paper is to be construed in the light of the other.

Now, if, on the second day of July, 1881, De Koven, the trustee, had refused to surrender this note and this stock to anybody, had determined to hold onto it until he was advised by the law what to do—if on that day the

North Chicago Railway Company had instituted its suit in equity, and made Goudy a party, DeKoven a party, Stickney & Co. a party, the Chicago and Evanston Railway Company a party, and these contracts were produced and laid before the court, there can be no doubt at all in my mind that by virtue of these contracts, the North Chicago Railway Company, *whom the bill alleges and whom the evidence shows to be, was the equitable owner of this stock and this note,* would have been entitled to a decree requiring DeKoven to convey this stock and note over to it. Did it do anything after that day to forfeit its right in that regard? There is nothing in the evidence to show. Could Goudy do anything after that to deprive the North Chicago Railway Company of the right to this stock and note? The only thing which it is alleged that he did in that direction was after the expiration of the time limited for Stickney & Co. to become the owners of this stock and this note, that he applied to Stickney & Co. for an extension of time in which to procure the right of way, and they assented to it, and that by mutual agreement between Goudy and Stickney & Co., the contract was thus extended.

If there were no other interests in the case involved than those of Goudy and Stickney & Co. there would be very great force in that objection; and undoubtedly after the first of July, 1881, Goudy was willing that the contract might be considered as standing between him and Stickney & Co.—that was the feeling of both of them—and so continued, perhaps, until a late period, perhaps, when Mr. Goudy became satisfied that Stickney & Co. were not going to do this work within proper time, and then informed them that he had no further control over the matter,and under the contract, the stock and the note

belonging to the North Chicago Railway Company their contract was at an end, and nothing further could be done without a new arrangement. Putting the evidence in the strongest light in that particular for Stickney & Co., and assuming that Mr. Goudy asked for an extension of time, and that Stickney & Co. agreed to it, yet that does not affect the right of the North Chicago Railway Company to the stock on and after the first of July, 1881, and that company being informed of Mr. Goudy's purpose to obtain it from DeKoven, gave notice to DeKoven that it was their property, exhibited the contract under which they were entitled to receive it, and they did receive it, *and the contract as between Stickney & Co. and Goudy, therefore, came to end.*

It is argued in the case, however, that the subsequent proceeding to which Goudy was a party and the North Chicago Railway Company was a party, and others were parties, tend to show that was a mere pretense, this assertion of right on the part of the North Chicago Railway Company. It is quite true that after the original arrangement had thus been destroyed by the failure of Stickney & Co. to pay the $25,000—that after that was done and after the stock and note had gone into the hands of the North Chicago City Railway Company, Goudy made a subsequent arrangement with that company by which he again acquired control of the stock and made a contract with Easton and Carey for the transfer to them. Undoubtedly the circumstances are such as to impose upon the court the duty to look narrowly into all of them, and so far as they are involved in that suggestion I have endeavored to do so, and I see nothing that affects at all the right in law and equity for the North Chicago Railway Company, which, having recovered the stock and

note, as they had the right to do under the contract, to make any arrangement that they might choose to make with Mr. Goudy in reference to it; and that, therefore, in this suit and under these circumstances there is no ground to question the validity of the contract between Goudy and Carey and Easton, or the subsequent transfer of the stock.

The suit, therefore, must fail as to those parties unless it be as is claimed, that there is ground for a money decree against Goudy with others in the suit. The only ground for a money decree that I can discover in this suit as against Goudy will arise out of his failure to procure the right of way within the time limited; for the contract provides that if he is in default as late as the first of June, 1881, that Stickney might pay the $25,000 and recover from Goudy such damages as he sustained by reason of such default. Without meaning to intimate any opinion upon the question whether any such damages may or not be recovered in some other form of action, I am entirely clear that no such claim is at all germain to this suit. The object of this suit is simply to compel the transfer and assignment of this stock to Stickney & Co. To that issue Goudy is perhaps not a necessary party, because he was confessedly no longer the owner of that stock or had any interest in it, and the claim that Stickney & Co. may have if they have any for damages against Goudy for his failure to procure the right of way within the time limited is a cause of action for which there is no ground to come into a court of equity, and it is entirely foreign to the whole frame and scope of this suit. There is nothing in the case from beginning to end that indicates a purpose on the part of the pleader who framed the bill in this case to seek a money decree against Goudy. The specific re-

lief asked is the transfer and assignment of this stock, followed by a prayer for general relief. I understand the rule to be that the court can not give relief under a general prayer which is inconsistent with a specific relief asked, and which is not within the frame and scope of the suit. I do not, therefore, see any ground for a money decree in this suit as between the parties, plaintiff and Goudy; and the suit as to the parties that I have named must be dismissed. It must also be dismissed as as to the Chicago, Milwaukee and St. Paul Railway Company. They disclaim having any ownership in the stock or this property, and there is nothing in the record that shows that they have any interest. The case must go as to them. I think the bill must also be dismissed so far as relates to the certificate of 110⅔ shares of stock issued to Stickney & Co. on the 30th of September, 1881. That order is made because I see no escape from the conclusion that those certificates or the right to those certificates was forfeited by the railway company in accordance with its by-laws.

But the suit as to the other defendants is retained and referred to a commissioner for the following purpose:

It is conceded in the case that the $20,000 which was paid to Mr. Goudy at the time of these negotiations was not simply paid as a part of the contract, but was paid to him to the end that he might use it to procure rights of way. The calculation was, to take all these agreements together.

Stickney & Co. were to build this road and become the owners of the stock. That was the purpose of their engagement, and all the parties knew that from the face of these agreements; and that they might construct it and thus become the owners of this stock and this note, $20,-

000 of this $55,000 was placed in the hands of Mr. Goudy for the purpose of preparing the way to the construction of the road by procuring rights of way along the line. Well, he did so to some extent. I infer from his testimony that the larger part of the $20,000 was expended in that way. I infer from the testimony that he was diligent in that direction; evidently miscalculated his power to obtain the right of way within the time limited by the contract, and he went as far as he could reasonably go, perhaps, within the time. But be that as it may, a large part of this $20,000 was expended by him to procure right of way, not for himself, but for Stickney & Co. Now, that right of way thus purchased by the money of Stickney & Co. is in the posseshion of this railroad company, and they have paid nothing for it to Stickney & Co. or their assignee, Hill, and it does not accord with my sense of justice to say or to hold that the money of Stickney & Co. thus invested in this right of way should go to the benefit of this railroad company without their paying for it, and that is a matter between the complainant and the railroad company. That right of way which may have been involved in the contract between Goudy and Easton and Carey was not in any legal or equitable sense the property of Mr. Goudy; in the purchase of it he was the representative of Stickney & Co., and there was enough in this case to put those who last contracted with Mr. Goudy upon the inquiry as to the extent of interest which Stickney & Co. had in that regard. If they had known all that did actually occur, I do not think they would be affected by any consideration in the case, other than that which arrises from the fact that they are in possession of, and using a right of way purchased with the money furnished by Stickney & Co.

to Mr. Goudy for that purpose. But I incline to the opinion that in this suit, which is to obtain the transfer of that stock to Stickney & Co., and for general relief, that it is within the scope and general purpose of this suit, as the court cannot give a decree to that effect, is to give them a money decree to the extent that under the proof, it appears that the defendants are in possession of the right of way which was paid for by their money. I think this case, therefore, must go to the commissioner to ascertain and report the amount paid by Mr. Goudy for the right of way, in execution of the contract between him and A. B. Stickney & Co., of May 28, 1880. On the coming in of that report, such further decree will be rendered as may be equitable and proper. And I incline to think now that that decree probably would be a lien against the Chicago and Evanston railroad, but it is not necessary to determine that now. As to all the defendants except the ones that I have named, the case would be retained for the coming in of that report.

Endorsed.

Filed June 8, 1885.

WM. H. BRADLEY. *Clerk.*

On the 8th day of June, 1885, a final decree was rendered (Rec., 256).

"This cause coming on for final hearing upon the pleadings, depositions and documentary evidence produced before the court and the cause having been argued by counsel, and the court being sufficiently advised in the premises. It is ordered and decreed that the complainant's bill be dismissed for want of equity as against the defendants, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John

DeKoven, John J. Johnson, S. S. Merrill, The North Chicago City Railway Company, and the Milwaukee and St. Paul Railway Company, with their costs to be taxed by the clerk. It is further ordered and decreed that so much of the complainant's bill as relates to the certificate of one hundred and ten and two-thirds shares of the capital stock issued to A. B. Stickney & Co., dated September 30, 1881, be dismissed for want of equity.

"It is further ordered and decreed that all relief be denied to the complainant upon all matters and things in controversy herein, except as to the amount of money paid by the defendant, William C. Goudy, for right of way in execution of the contract between him and A. B. Stickney & Co. of May 28, 1880, and for the purpose of ascertaining said amount of money it is ordered that this cause be retained as to the other defendants, and that it be and is hereby referred to Henry W. Bishop, one of the masters in chancery of this court, to take additional testimony as to such amount, and that he make report of the amount so paid, and that on the making of such report such further decree will be rendered as may be equitable.

"It is further ordered that for the better discovery of the matters aforesaid, the parties are to produce before the said master upon oath all deeds or books, papers and writings in their custody or power relating thereto, and are to be examined on oath as the said master shall direct.

"And thereupon the complainant prays an appeal to the Supreme court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions required by law and with security to be approved by the court."

On the 14th day of July, 1887, the master in chancery having made a report in pursuance of the directions of said decree, and exceptions having been taken thereto by both parties, the court entered the following decree (Rec., 314):

"It is ordered, adjudged and decreed as follows, viz: that the exceptions of both complainant and defendant, the Chicago and Evanston Railroad Company, to the report of the master in chancery filed herein on the 31st day of January, 1887, be and the same are hereby overruled and the said report approved and affirmed; that said Chicago and Evanston Railroad Company do forthwith pay unto said complainant the sum of six thousand five hundred thirteen dollars, together with interest upon the same from the 30th of January, 1887, at six per cent., and also costs of said reference to the master, to be taxed by the clerk of this court, and also the costs of this suit for which plaintiff may have execution.

"It is further ordered and decreed that all other relief prayed in the complainant's bill be denied as against said defendant, the Chicago and Evanston Railroad Company, and that the complainant's bill be dismissed out of court for want of equity as against the remaining defendants, T. W. Wadsworth, Edwin Walker, Elijah K. Hubbard, J. C. Easton, Julius Wadsworth, Hugh T. Dickey, J. Milbank, James Stillman, James T. Woodward, E. L. Frank, William Rockafeller, Selah Chamberlain, and George Smith, with their reasonable costs, to be taxed by the clerk, and that they have execution therefor against the said complainant."

"And thereupon the complainant prays an appeal to the Supreme court, which is allowed upon his filing a bond in the penal sum of five hundred dollars, with provisions re-

quired by law, and with security to be approved by the court."

On the 18th day of August, 1887, affidavits of A. B. Stickney and James J. Hill were filed. (Rec., 695.) In these affidavits the deponents both state that the value of the certificates of stock of the Chicago and Evanston Railroad Company, the ownership of which were matters in controversy in the above entitled cause, exceeds the sum of five thousand dollars, exclusive of the costs of the suit.

On the same day an appeal bond was filed (Rec., 697): the obligors are James J. Hill, W. P. Clough and E. Sawyer; the obligees are the Chicago and Evanston Railroad Company, the North Chicago City Railway Company, William C. Goudy, Volney C. Turner, John DeKoven, and all others who were parties to the amended bill, as against a part of whom the bill was dismissed by the decree of June 8, 1885.

The condition of the bond is as follows to wit:

"Whereas, lately, at the July term, 1887, of the United States Circuit court for the Northern district of Illinois, in a suit depending in said court wherein said James J. Hill was complainant, and the Chicago and Evanston Railroad Company and the other above named obligees of this bond, were defendants, a decree was rendered from which the said James J. Hill has taken an appeal to the Supreme court of the United States; now, the condition of the above obligation is such that if the said James J. Hill shall prosecute his appeal with effect, and answer all costs if he fails to make his plea good, then the above obligation to be void, otherwise to remain in full force and effect.

No citation has ever been issued or served.

MOTIONS.

The North Chicago City Railway Company, the Chicago, Milwaukee and St. Paul Railway Company, William C. Goudy, Volney C. Turner, George Chandler, Samuel B. Chase, Ebenezer Buckingham, John DeKoven, John J. Johnson, and S. S. Merrill, move the court to dismiss the appeal herein as to them and each of them for the following reasons:

1. The decree of June 8, 1885, which was a final one, dismissed the bill of complaint as against them for want of equity, with their costs, and denied all relief as against them and each of them.

2. The appeal from said decree of June 8, 1885, was allowed upon the condition that a bond, in the penal sum of five hundred dollars, with provisions required by law, and with security to be approved by the court, should be filed, but no such bond was filed within the period of two years after said decree was entered.

3. A transcript of the record was not filed at the next term after said decree was entered and appeal prayed, and was not filed until after two subsequent terms had elapsed.

4. The appeal bond does not show that it was filed in pursuance of the decree of June 8, 1885, but on the contrary recites an appeal from the decree of July 14, 1887.

The Chicago and Evanston Railroad Company, T. W. Wadsworth, Elijah K. Hubbard, Edwin Walker and J. C. Easton move the court to dismiss the appeal as to them and each of them from the decree of June 8, 1885, for the following reasons:

1. The decree of June 8, 1885, denied all relief as against them and each of them, except as to the amount

of money, to determine which the bill was referred to the master, and was a final decree as to all other matters.

2. The appeal from said decree of June 8, 1885, was allowed upon the condition that a bond, in the penal sum of $500, with provisions required by law, and with security to be approved by the court, should be filed, but no such bond was filed, within the period of two years after said decree was entered.

3. A transcript of the record was not filed at the next term after said decree was entered and appeal prayed, and was not filed until after two subsequent terms had elapsed.

4. The appeal bond does not show that it was filed in pursuance of the decree of June 8, 1885, but on the contrary recites an appeal from the decree of July 14, 1887.

The Chicago and Evanston Railroad Company, T. W. Wadsworth, Elijah K. Hubbard, Edwin Walker and J. C. Easton, move the court to dismiss the appeal herein as to the decree of July 14, 1887, for the following reasons:

1. The appeal bond filed herein should make them sole obligees in such bond, or rather the Chicago and Evanston Railroad Company, against whom such decree was rendered, should be the sole obligee, the other persons named in said bond as obligees not being parties to the appeal.

2. The only matter which can be brought before this court for review, is as to the amount fixed by the decree of July 14, 1887, and which the Chicago and Evanston Railroad Company was required to pay, the decree of June 8, 1885, being final as to the other questions, this appeal should be limited to that decree and proper orders as to bond and otherwise to that end should be made.

Points and Authorities.

I.

THE DECREE OF JUNE 8, 1885, WAS A FINAL DECREE AS TO ALL OF THE DEFENDANTS FROM WHICH AN APPEAL COULD HAVE BEEN TAKEN AND PROSECUTED.

While this court has decided that an appeal is effected by the allowance of an appeal, even though a bond is not filed, yet in the case now before the court the order only allowed the appeal from the decree of June 8, 1885, *upon a condition* that a bond should be presented and approved. A bond was never presented or approved, and as there was a failure to comply with the condition, no appeal was allowed.

The decree of June 8, 1885, was rendered on a final hearing upon the issues and evidence. The bill was dismissed for want of equity as to ten of the defendants, and dismissed as to a claim for one hundred and ten shares of stock for want of equity, and also denied *all relief* to the complainant upon *all matters and things in controversy* except as to an amount of money, and for the purpose of ascertaining that amount only, it was ordered that the bill be retained as to the other defendants not dismissed and referred to the master.

This was a final decree from which an appeal would lie. It was so considered by the complainant, for he prayed an appeal which the court conditionally allowed. A bond has never been filed. The transcript of the record should have been filed at the October term, 1885,

but it was not filed until the October term, 1887. No citation has been issued or served. For these reasons the appeal from the decree of June 8, 1885, should be dismissed.

The case was ended as to all of the defendants, dismissed by that decree, and they have not been in court for any purpose since that time. There was no reservation in the decree as to them, and they were not retained for any purpose. The decree was certainly final as to them, and more than two years having elapsed without completing the appeal or prosecuting it, it is now too late to appeal.

As to all of the other defendants who were retained, the decree was final. The case was heard on its merits, upon the pleadings and evidence, and *all relief* was expressly *denied* the complainant, except as to a certain amount of money. As to that sum of money the amount was to be ascertained, and when a report was made, such further decree as might be equitable would be rendered as to it. The decree, therefore, was as to the retained defendants, such an one as an appeal would lie from, the remaining proceeding was for a limited purpose and in execution of the order. An appeal from the subsequent decree of July 14, 1887, rendered upon the master's report fixing the amount of money, would not be an appeal from the final decree of June 8, 1885, nor bring up that decree for review. Indeed the complainant has not undertaken to appeal in 1887, from the former decree, because the bond recites an appeal from the order of July 14, 1887, as the one from which the appeal is taken.

This proposition is laid down by this court in a number of cases which are collected below. As to what is a final decree to support an appeal this court has also made numerous decisions some of which are collected here.

In *R. R. Co.* v. *Express Co.*, 108 U. S., 24, the express company filed a bill for injunction against the railway company to enjoin it from interfering with or disturbing the express company in the enjoyment of its facilities for the transaction of express business over the railway company's railroad. The court entered a decree, laying down the law applicable to the case, and enjoined perpetually the railway company from interfering.

It also found the regulations to be observed by the express company, and also provided that complainant could apply for an order to refer the cause to a master, to take proofs for the purpose of determining what amounts the railway company had in the past unjustly charged the express company and which should be refunded. The railway company appealed from that decree, and the express company afterward obtained an order referring the cause to a master. The express company, in this court, made a motion to dismiss that appeal on the ground that it was not a final decree.

That motion was denied.

This court *held*, citing *Bostwick* v. *Brinkerhoff*, 106 U. S., 3, and *Grant* v. *Phœnix Ins. Co.*, 106 U. S., 429, that a decree is final, for the purposes of appeal, when it terminates the litigation between the parties, on the merits, and leaves nothing to be done but enforce by execution what has been determined.

2. That matters relating to the administration of the cause and accounts to be settled in accordance with the principles fixed by the decree are incidents of the main litigation which may be settled by supplemental order after final decree.

In *Forgay* v. *Conrad*, 6 How, 201, it was *held* that

where a decree decides the right to property and directs it to be delivered up or sold or a sum of money to be paid and the complainant is entitled to have such decree carried into effect, this is a final decree from which an appeal lies, although there may be a reference to the master and the bill retained for a further decree in pursuance thereof.

In *Whiting* v. *Bank of U. S.*, 13 Pet., 15, it was *held* that a decree of foreclosure and sale of mortgaged premises was a final decree and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by decretal order.

The same rule was laid down in *Michoud* v. *Girod*, 4 How., 503.

In *Thomson* v. *Dean*, 7 Wall., 342, the controversy was as to the ownership of certain shares of stock.

The decree directed Dean to transfer upon the books of the company a certain number of shares to each of two plaintiffs, and also directed that an account be taken and stated as to what was paid, and to be paid, for the stock, etc.

This court held that this was a final decree, from which an appeal could be prosecuted.

In *French* v. *Shoemaker*, 12 Wall., 97, it was *held:*

Where a case came to hearing on the bill, answer and replication, and on the cross-bill, answer and replication, and upon the proofs, and the court found "that the equity of the case is with the complainant," and that the defendant be enjoined, etc., and that he pay costs the decree was final, although leave was given at the foot of the decree for either party to apply for such further order as might be necessary to the due execution of the same, or

as might be required in relation to any matter not finally determined by it.

The following additional cases in this court also lay down principles similar to those determined by the above quoted decisions.

Barnard v. *Gibson*, 7 How., 650.
R. R. Co. v. *Swasey*, 23 Wall., 405.
Green v. *Fisk*, 103 U. S., 518.
Bronson v. *R. R. Co.*, 2 Black., 524.
Stovall v. *Banks*, 10 Wall., 583.

That where a decree is final as to some parties, although not as to others, an appeal lies as to those whose interests are finally determined, has been decided a number of times by this court.

Very early, in the case of *Todd* v. *Daniel*, 16 Pet., 521, it was decided that one defendant might appeal if he have a severable interest.

The same doctrine is laid down in *Forgay* v. *Conrad*, 6 How., 201.

In *Withenbury* v. *U. S.*, 5 Wall., 819:

Several libels were filed in that court for the condemnation, as prize of war, of large quantities of cotton and other property captured on the interior navigable waters of the United States, or on land adjacent thereto. On motion, these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libeled. Among these claims was that of Withenbury & Doyle. They denied the validity of the capture, and insisted on their title to 935 bales of the cotton. The claim was dismissed on hearing.

An appeal was taken, and a motion for dismissal was

made on ground that the libel as consolidated, was not disposed of, and therefore the decree was not final.

But the court held it was final as to these parties, although not disposed of as to others, and that they had the right to appeal.

The COURT said:

"The appeals in the Bermuda case, and in the case of the Alexander cotton, were of the same character with that now before us. In neither of these cases had all matters arising upon the libel and the claims been finally disposed of. In the first, the appeal was by claimants of part of the property libeled whose claims had been dismissed, and the property claimed by them condemned. In the other the appeal was by the United States from a decree of restitution in favor of a claimant of part of the property libeled, in the same consolidated cause from a decree in which against another claimant, the appeal which we are now asked to dismiss was taken.

"It is true, that in the cases just referred to no question of jurisdiction was made at the bar, but it existed necessarily in each cause and was practically determined in favor of the jurisdiction, and, as we still think, rightly determined."

In *Germain* v. *Mason*, 12 Wall., 259, it was *held:*

1. Though several defendants may be affected by a judgment or decree there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants.

2. A judgment *in personam* against one defendant for a sum of money, which at the same time establishes the debt as a paramount lien on real estate as to other defendants, may be brought to this court by the party against

whom the personal judgment is rendered without joining the others.

In *Milner* v. *Meek*, 95 U. S., 252, It was *held*:

Where a decree determined the amount and priority of respective liens, an appeal therefrom will not be dismissed on the ground that it was taken by one lien creditor only, if it brings up so much of the case and such of the parties as are necessary for the determination of his rights.

II.

THE APPEAL PRAYED FROM THE DECREE OF JUNE 8, 1885, WAS NOT PROSECUTED BY FILING THE TRANSCRIPT OF THE RECORD AT THE NEXT TERM, AND IT IS NOW TOO LATE TO GIVE JURISDICTION.

The decree of June 8, 1885, recites that an appeal was prayed to this court and allowed upon the filing of a bond. No bond was ever filed in pursuance of that appeal. But irrespective of the question whether it is too late to file a bond under that appeal, the appeal has been abandoned or lost by failure to file a transcript at the term next succeeding the allowance of the appeal. No transcript in this case was filed until 1887, more than two years after the allowance of the appeal from the decree of June 8, 1885.

If there is any question upon which the decisions of this court, from its inception down to the present time, have not varied, it is that in order to save an appeal a transcript must be filed during the term next succeeding the allowance of the appeal.

The leading case on this subject is *Edmondson* v. *Bloomshire*, 7 Wall., 306, which holds:

1. If it is apparent from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed, although neither party ask it.

2. An appeal or writ of error which does not bring to this court a transcript of the record before the expiration of the term to which it is returnable is no longer a valid appeal or writ.

3. Although a prayer for an appeal and its allowance by the court below constitute a valid appeal, though no bond be given (the bond being to be given with effect at any time while the appeal is in force), yet if no transcript is filed in this court at the term next succeeding the allowance of the appeal it has lost its vitality as an appeal.

4. Such vitality cannot be restored by an order of the Circuit court made afterwards, accepting a bond made to perfect that appeal. Nor does a recital in the citation, issued after such order that the appeal was taken as of that date revive the defunct appeal or constitute a new one.

This rule that the transcript must be filed at the next term succeeding the allowance of the appeal or writ of error seems first to have been laid down in

Hamilton v. *Moore*, 3 Dall., 371,

and has never been departed from. There has been an unbroken line of authorities since then deciding the same way, viz:

Blair v. *Miller*, 4 Dall., 21.
U. S. v. *Hodge*, 3 How., 534.
U. S. v. *Villabolas*, 6 How., 90.
U. S. v. *Curry*, 6 How., 112.
Steamer Virginia v. *West*, 19 How., 182.
U. S. v. *De Pacheco*, 20 How., 261.

Insurance Co. v. *Morse*, 21 How., 200.
Mesa v. *U. S.*, 2 Black, 721.
U. S. v. *Gomez*, 1 Wall., 690.
Castro v. *U. S.*, 3 Wall., 46.
Mussina v. *Cazazos*, 6 Wall., 355.

with many later cases.

In *Grigsby* v. *Purcell*, 9 Otto, 505, it is *held* that at any time before the hearing advantage may be taken of a failure to docket a cause in time. Appearance is no waiver.

It is true that there are some cases in which an excuse was allowed for failure to file the transcript in time, but they are all cases in which there was some fault of the clerk that occasioned the delay. As was said in *U. S.* v. *Gomez*, 3 Wall., 762, the appellant must not be guilty of *laches* or want of diligence.

The appeal not having been prosecuted in time, that appeal taken from the order of July 14, 1887, cannot, in any view, be considered as a new appeal from the decree of June 8, 1885, not only because it purports in the bond given to be only an appeal from that of July 14, 1887, but because at that time the period within which an appeal must be taken had elapsed.

Section 1,008 of the revised statutes provides that the appeal must be taken within two years from the entry of the decree, and therefore it was too late to take an appeal from the decree of June 8, 1885, after the expiration of two years therefrom; and, as is shown under the next point, the only question which can now be presented to this court is the validity of the decree or order confirming the master's report.

III.

THE APPEAL FROM THE DECREE CONFIRMING THE MASTER'S REPORT CANNOT BRING UP FOR REVIEW ANY QUESTIONS EXCEPT THOSE WHICH WERE DECIDED SINCE THE FINAL DECREE OF JUNE 8, 1885.

The decree of June 8, 1885, being a final decree, from which an appeal could have been perfected, and the appellant having failed to perfect an appeal from that decree, he cannot, upon an appeal from the order of the court confirming the master's report, attack the validity of that decree which he has acquiesced in.

In the case of *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S., 552, a suit for foreclosure of a mortgage, commenced in a State court, was removed to the Circuit court, where a motion to remand it was made and overruled. A final decree in favor of the complainant was passed, whereunder the mortgaged property was sold. From the order confirming the sale an appeal was taken.

It was *held*, that the final decree, not disclosing a want of jurisdicrion of the court below as to subject-matter, or parties will be examined here only to ascertain whether the sale conformed to its provisions.

There were numerous assignments of error besides the one of jurisdiction, but the court held that none of them could be inquired into except those relating to the sale.

In this case the facts were: Turner and others commenced a suit against I. B. and W. Railway Company, the Farmers' Loan and Trust Company and others, for a foreclosure of several mortgages. The Farmers' Loan and Trust Company as trustee, filed a cross-bill for foreclosure of mortgages as prior liens. July 18, 1877, a

final decree was entered ascertaining the amounts due to the Farmers' Loan and Trust Company, and requiring the Railway Company to pay such amount, $6,234,625 within twenty days, and in default that the equity of the defendants in the cross-bill be barred and foreclosed and the property be sold. The sale occurred October 30, 1878, and was reported. December 23, 1878, an order was entered confirming the sale. February 3, 1879, Turner and others prayed an appeal from the final order confirming the sale. The appeal was allowed and a bond filed.

On this state of facts this court held that the first decree was not before them for review, but only the order approving the sale, and declined to decide any question which was based on alleged error in the decree of July 18, 1877.

In *Sage* v. *R. R. Co.*, 96 U. S., 712, WAITE, C. J., had decided the same way as Justice Harlan in the above case. In this case a decree was entered October 22, 1875, for the foreclosure of a mortgage, by consent, an appeal taken and *supersedeas* granted. On motion in this court the *supersedeas* was vacated, but the appeal was allowed to stand.

See 93 U. S., 412.

After the *supersedeas* was vacated the sale was had and the order confirming the sale entered August 31, 1877. On the same day the same parties whose appeal from the decree of 1875 was pending, prayed an appeal to this court "from certain orders entered in the cause October 21, 1875, and from the decree of confirmation and each and every other order made in the cause August 31, 1877." The appellees moved to dismiss.

On page 714 WAITE, C. J., says:

"It is clear that this appeal does not bring up for examination the orders of October 21, 1875. Every proceeding in the cause which was prior to October 22, 1875, must be examined, if at all, under the appeal from the decree of that date still pending here."

In *Buffington* v. *Harvey*, 95 U. S. 99, Bradley, J., says:

"This is an appeal from a decree sustaining a demurrer to a bill of review, and dismissing the bill, the effect of which is to leave the decree in the original cause in full force and effect. *The only* questions open for examination on this appeal are such as were open on the bill of review, and these, as shown in *Whiting* v. *Bank*, 13 Pet., 6, and *Putnam* v. *Day*, 22 Wall., 60, were only such as arose upon the pleadings proceedings, and decree, without reference to the evidence in the cause. The decision of the court upon the issues of fact, so far as they depend upon the proofs are conclusive on a bill of review."

In *Orchard* v. *Hughes* 1 Wall., 76, the converse of the principle of the above two cases was affirmed, namely, that in order to review a decree of confirmation of a sale, an appeal must be taken from that decree, notwithstanding the fact that an appeal is taken from the decree of foreclosure and sale.

In *Porter* v. *Pitts. Bess. Steel Co.*, 120 U. S., 677, the principle is recognized, although not applied under the facts.

BLATCHFORD, J., says: "It has been contended for the appellees that the appeals by Porter now under consideration are appeals only from the decree of October 9, 1886; that he did not perfect any appeal from the decree of February 16, 1886; that the latter decree was a final de-

cree; that the errors which Porter now insists on were errors committed in entering the decree of February 16, 1886; that none of the errors now assigned can be considered by this court, because of the want of any appeal from the decree of February 16, 1886, and because the adjudications now complained of were made by that decree, and not by the decree of October 9, 1886.

"It is sufficient answer to these contentions to say that the decree of February 16, 1886, though a final decree of foreclosure and sale as respected the interests of the mortgagor, and in some other respects was not a final decree in respect of the matters involved in these appeals, etc."

In *Crosby* v. *Buchanan*, 23 Wall., 453, this same question was raised by counsel and passed on by the court.

A decree was rendered in 1853, and another in 1872, from which an appeal was taken. Counsel for appellees claimed that the appeal did not bring up matters prior to 1853 because the decree of that year was final, and no appeal was prayed from it.

The court held that the decree of 1853 was not final, and therefore the appeal from the decree of 1872 brought up the whole case. The language of the court and this decision seems, by inference, to lay down that if the first decree is final, so as to support an appeal, and no appeal is taken from it, matters prior thereto cannot be inquired into on an appeal from a subsequent decree.

So in the case at bar, as we contend, the decree of June 8, 1885, having settled *all* the rights of *all* of the parties, was a final decree, and it is brought directly within the reason of the rule as laid down in *Turner* v. *Farmers' Loan & Trust Co.* Therefore, the appeal from

the decree confirming the master's report cannot bring up for review the propriety of the decree rendered June 8, 1885.

It is conceded that a new appeal bond may be filed if the appellant asks leave to do so, which will show an appeal only from the order of July 14, 1887, and runs to the Chicago and Evanston Railway Company as sole obligee. Such an appeal will raise no question except as to the correctness of the amount reported by the master.

The court will see the propriety of determining in advance of a final argument the questions which may be considered and decided, and who are the parties now within the jurisdiction of the court by the appeal.

E. WALKER,

For the Chicago and Evanston R. R. Co. and other defendants retained until July 14, 1887.

W. C. GOUDY,

For the defendants dismissed by decree of June 8, 1885.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY ET AL.

Appeal from Northern District of Illinois.

REPLY BRIEF.

E. WALKER,
FOR THE CHICAGO AND EVANSTON RAILROAD COMPANY AND OTHERS, DEFENDANTS, RETAINED UNTIL JULY 14th, 1887.

W. C. GOUDY,
FOR THE DEFENDANTS DISMISSED BY DECREE OF JUNE 8th, 1885.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

JAMES J. HILL
vs.
CHICAGO AND EVANSTON RAILROAD COMPANY ET AL.

Appeal from Northern District of Illinois.

Reply.

The counsel for the appellant suggests that the motions be retained until final hearing, and gives as a reason that there is a disagreement as to the facts necessary for the determination of the motion. There is no dispute whatever as to the facts necessary for the determination of each of the motions now made. There may be a controversy on errors assigned if the appeal is sustained, but, even in that case, the difference will be as to questions of law, and not as to facts.

The object of the bill clearly appears and is disclosed by the prayer. It seeks 875 shares of stock of the Chicago

and Evanston Railroad Company, under a contract set up in the bill, and 110 and two-thirds shares from the company itself, which it is alleged have been illegally forfeited. The bill asks that these shares of stock be transferred and assigned to the complainant, and having received such shares, the same being a majority of the capital stock, that the control of the company itself be placed in his hands. In aid of such relief an injunction is asked. There is no other specific relief sought, but there is prayer for general relief. The defendants were divided into five or six classes. The Chicago and Evanston Railroad Company itself and the persons who were directors at the time the bill was filed—Easton, Wadsworth, Walker, Hubbard, Johnson and Merrill—who, it is alleged, held the stock sought, and were directors of the company, were one class, and the only defendants against whom the specific relief was sought. Stickney and Goudy, as parties to the contract under which the claim was asserted to the shares, were also made parties, and constituted another class, but no specific relief was asked against either, and no claim was asserted for a decree against Stickney. The only decree sought against Goudy was for money, under the prayer for general relief. Another class consisted of Goudy, Turner, Chandler, Chase, Buckingham, who had been directors of the Chicago and Evanston Railroad Company, but no decree of any kind was asked against them. Still another class consisted of DeKoven, who was the trustee under the provisions of the contracts set out in the bill, holding the 875 shares of stock, and which he had surrendered. Still another class consisted of the North Chicago City Railway Company, which was the real owner of the 875 shares when the contract was made, and to which the shares were returned by De Koven, as

provided in the contract. Still another class was the Chicago, Milwaukee and St. Paul Railway Company, for which company it was alleged Easton and others held the stock in trust.

A final hearing was had on the bill, answers, replications and proofs, which resulted in a decree, entered June 8, 1885. (Motion papers, 15.)

This decree dismissed the bill for want of equity against Goudy, Turner, Chandler, Chase, Buckingham, Johnson, Merrill, the North Chicago City Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, with their costs to be taxed by the clerk.

This was the end of the case after a trial upon the merits, against all of these defendants. They ceased to be parties, and had judgment for their costs against the complainant. They were not before the court for any purpose after the date of that decree. If that is not a final decree as to such defendants, it would be difficult to find one.

The decree went further, and ordered that the bill be dismissed so far as it related to the 110 2-3 shares of stock. That was the end of the suit, so far as related to such shares, and as to all of the defendants in the case.

The decree went further, and denied *all relief* to the complainant upon *all matters and things in controversy therein;* except as to the amount of money mentioned in the decree; that was certainly the end of the suit as to the specific relief sought by the bill. It was also the end of the suit as to relief sought under the prayer for general relief as to all of the defendants, except as to such amount of money. For the purpose of ascertaining that amount, the case was retained as to the Chicago and Evanston Railroad

Company and the persons who were then its directors, and who held the shares of stock which had been sought by the bill. Most clearly, the decree was final and the suit ended as to everything in controversy in the suit, except the amount of money which was to be fixed when a further decree entered as to that.

It is true that when the subsequent decree was entered fixing the amount to be paid and awarding execution therefor, the decree repeated the statement of the former bill, that all other relief prayed for in the bill be denied as against the defendants still remaining in the suit, and that the bill be dismissed out of court as against all of the remaining defendants except the Chicago and Evanston railroad company against which the money decree was entered. The repetition of such denial of relief did not qualify or diminish the force of the decree or 1885.

On this state of facts it is claimed:

First. That the decree of June 8, 1885, was final as to the defendants who were then dismissed and an appeal could have been taken by the complainant and the case reviewed in this court. Such an appeal was prayed and allowed upon condition of filing a bond; but no transcript was filed for more than two years after the date of such decree and, therefore, the appeal prayed and allowed was abandoned, and it should now be dismissed as against all of the defendants who were dismissed from the suit by the decree of June 8, 1885.

Second. That the decree having denied all relief asked by the bill, both specific and general, as against all of the defendants except as to the amount of money to be ascertained on reference to the master, was final as to all the matters in controversy except such amount of money,

which was to be allowed under the prayer for general relief. The court decided by the decree that the complainant was entitled to that sum of money from the Chicago and Evanston railroad company, and nothing remained but to fix the amount and order its payment. It is insisted, therefore, that an appeal might have been taken by the complainant from such decree, and that it was final as to all matters except as to the amount of money. If so, as the transcript was not filed for more than two years, it follows that the appeal from the decree of June 8, 1885, should be dismissed as to defendants retained by that decree as well as the defendants who were then dismissed.

Third. As the decree of June 8, 1885, was final, and might have been brought to this court on review on the appeal then prayed and allowed, it cannot now be reviewed upon an appeal taken from the decree rendered July 14, 1887, which decree was merely in execution of the former decree.

Fourth. The appeal bond filed August 18, 1887, is insufficient, because it recites an appeal from the decree of July 14, 1887, only, and yet runs to all of the defendants to the original bill as obligees. The decree of July 14, 1887, is against the Chicago and Evanston Railroad Company only. The only question which may be raised upon that decree is as to the sufficiency of the amount, and no persons were interested in that question except the complainant, Hill, and the Chicago and Evanston Railroad Company. It is, therefore claimed that the appeal from the decree of July 14, 1887, should be dismissed unless a sufficient bond is filed.

It is claimed by counsel for appellant that an appeal could not be prosecuted from the first decree rendered because the case was retained as to a part of the defend-

ants in the court below. Reference is made to the practice in the court of King's Bench where, it is said, the record could not be in both courts at the same time. That reason might be good where the original record is to be carried up to the court of review. The reason does not apply to this court where jurisdiction is obtained by filing a transcript of the record of the court from which the appeal is taken. The papers remain in the lower court for such proceedings as are not inconsistent with the appeal. In all cases where the appeal does not operate as a supersedeas, proceedings are taken in the court below to execute the decree, and no difficulty is experienced because the transcript is filed in this court.

There is no general appearance in this case, but only one, for the purpose of making the motions to dismiss. Even if there was, jurisdiction would not be conferred upon this court, if the points made by the appellees are well taken. This court will at any stage of the proceeding dismiss the appeal and refuse to consider the errors assigned, if there is a want of jurisdiction.

E. WALKER,

For the Chicago and Evanston Railroad Company and other defendants retained until July 14, 1887.

W. C. GOUDY,

For the defendants dismissed by decree of June 8, 1885.